95-1451

Supreme Court, U.S.
FILED
JUL 13 1995
CLERK

No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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October Term, 1995

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Class of Lourdes Gutierrez, et. al.,

Petitioner,

versus

Santa Ana Unified School District, et. al.,

Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Does the U.S. Consitution grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic processes of our society?

2. Despite the Rowley decision, the U.S. Supreme court has never adequately defined what exactly is an educational benefit. Such exactitude is necessary for a proper analysis of what exactly is to be conferred upon disabled, elementary school students.

3. Although the United States Supreme Court has carefully declined to address the issue of whether Section 504 creates a private right of action, the

Circuit Courts of Appeal which have addressed the issue have uniformly upheld existence of such a Right. Clarity is needed on this issue.

4. Does wanton elementary instruction and willful non-assessment of elementary school students under IDEA, constitute violations of the guarantees of equal protection, procedural and substantive due process under the 14th Amendment to the United States Constitution since it is uncontested that the state of California has chosen to provide a system of education to the residents of California and the 14th Amendment requires that a state which has undertaken to provide the opportunity of an education make that opportunity available to all on equal terms--especially when the California Constution states education is a fundamental right.

5. Despite state case law and various government codes, is it illegal and unconsitutional for School districts and their employees to:

a) engage in bad faith school-wide policies which deprive the elementary school students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act; and

b) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and

c) refuse to assess students when their parents request assessment; and

d) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and

e) fail to inform or, in fact, misinform parents of their children's progress by (i) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (ii) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide; and

f) conduct in age promotion policy which pushes the students -- like herds of cattle -- to the next grade despite their illiteracy.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals of the State of California, Fourth Appellate District, Division Three are Respondents, Santa Ana Unified School District and its superintent, Rudy Castruita and Petitioners Lourdes Gutierrez on behalf of a class consisting of her son, Roberto Gutierrez and all students and parents of students of Glenn Martin Elementary School. The names of the remainder of the class other than those mentioned above were never determined as the underlying case never proceeded to that point.

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JURISDICTION

Jurisdiction arises from Petitioner's right to seek certiorari in the Supreme Court to review a state court judgment "is not granted by any State, and exists by virtue of federal statute [28 U.S.C. §1257] with or without the consent of the State whose judgment is sought to be reviewed." Ross v. Moffitt, 417 U.S. 600, 617 (1974).

I. Introduction

Review by the U.S. Supreme Court differs fundamentally from review by the courts of appeal: The court of appeal's primary function is to review for trial court error; but the U.S. Supreme Court's purpose is to decide important legal questions and maintain national harmony and uniformity of decision.

a) Importance of Issues Involved

Petitioners respectfully request that each elementary school student be afforded a real educational opportunity to become critically literate in basic academic skills such as reading, writing, and arithmetic. The educational opportunity would guarantee that

each elementary child is not coerced into illiteracy by elementary schools that 1) engage in careless and wanton instruction, and 2) bad faith policies that preclude mandatory assessments under Individual with Disabilities Education Act (hereinafter referred to as IDEA).

The U.S. Supreme Court holding requested by Petitioners would merely grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic processes of our society. That is the crux of this case.

The importance of public education has been unequivocally recognized by the federal courts and, in particular, by the Supreme Court. In Plyler v. Doe, 457 U.S. at___, Justice Brennan astutely noted that:

> Public education is not a "right" granted to individuals by the constitution. [Rodriguez.] But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. ["Some] degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." [In] addition, education

provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

Also, in Rodriguez, the Supreme Court reasoned that a class saddled with disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness commands extraordinary protection from the majoritarian political process. 411 U.S. at 40, 93 S.Ct. at 1300.

The Supreme Court held that:

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual meri' [Illiteracy] is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile [a] status based denial of basic education with the framework of equality embodied in the Equal Protection Clause... (emphasis added)

Roberto Gutierrez is a member of a politically powerless class that has consistently been discriminated against--the disabled

illiterate children of the United States of America who cannot vote and cannot read.

The issues involved in this case deal primarily with the deprivation of educational opportunity as to elementary school students desperately trying to learn to read and write. The issues are intrinsically important, and "beyond the academic or the episodic." Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). The issues relate "to the public as distinguished from" importance to the particular "parties" involved. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923); Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955).

Petitioners are not seeking this Court to review a lower court decision which turns solely upon an analysis of the particular facts involved, or upon the construction of particular contracts or written instruments, or review of a factual issue. Thus, on this point, this Petition for Certiorari is in conformity with the law. "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); see Texas v. Mead, 465 U.S. 1041 (1984) (Stevens, J.).

Thus, in practical effect, the U.S. Supreme Court functions as an "institutional overseer" of the Nation's courts. It decides cases involving important public policy questions and other matters significantly affecting the administration of justice, and resolves conflicts among the courts. This particular case involves the dire need for a broad "institutional" review rather than mere error by the court of appeal. This case entails:

(a) a conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari. See Hudson v. Louisiana, 450 U.S. 40, 42 (1981); William E. Arnold Co. v. Carpenters District Council, 417 U.S. 12, 14 (1974); Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 371-72 (1974). See also Limbach v. Hooven 69 Allison Co., 466 U.S. 353, 362 (1984), where the Court stated: "We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court."

(b) Even despite the absence of a conflict, state court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is

sufficiently important. E.g., Kolovrat v. Oregon, 366 U.S.187, 191 (1961). Respondents' bad faith school-wide policies deprive the elementary school Students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act (hereinafter referred to as simply 504). Specifically, Respondents willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed (CT, 65 and 223). In fact, teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities. (CT. 223).

Respondents equally refuse to assess students when their parents request assessment. (CT. 62-63). Even if the student is diagnosed with a disability, as Roberto was, Respondents refuse or unjustifiably delay to develop a special education program for the student. Moreover, Respondents fail to inform or, in fact, misinform parents of their children's progress by (1) refusing to provide the students' low CTBS scores which are addressed specifically to the parents (CT. 107); and (2) simultaneously giving these students As and Bs in these subjects when CTBS

scores indicate their in the bottom percentages nation-wide. (CT, 87, 107-112). Furthermore, Respondents' age promotion policy pushes the students -- like herds of cattle -- to the next grade despite their illiteracy. (CT 65-66, 105-106).

(c) Where a state court has decided a substantial and unsettled federal question arising under the Constitution and has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court should grant the petition for certiorari despite the absence of a conflict. See Oregon v. Kennedy, 456 U.S. 667, 668-69 ( 1982) (state court took an "overly expansive view of the Double Jeopardy Clause"); Tibbs v. Florida, 457 U.S. 31, 39 ( 1982 ) (certiorari to review "this interpretation of the Double Jeopardy Clause"); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); Davis v. Alaska, 415 U.S. 308, 315 (1974); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 565 (1977); Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981 ); Rice v. Sioux City Cemetery, 349 U.S. 70 ( 1955 ).

(d) Where a state court has relied upon a prior Supreme Court decision, or a constitutional principle previously established by the Court, that is now considered ripe for reconsideration and possible

overruling or change, certiorari may be granted. See, e.g., Malloy v. Hogan, 378 U.S. 1 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963).

Thus, it is vitally and critically important to understand that Petitioner admits and freely stipulates that there is no fundamental or statutory right to equal educational outcomes. The sturdy persistence of different educational outcomes is partly because we don't know how to change them, and partly because we feel that changing them would require intolerable violations of the freedom and privacy of individuals. If so, and if an obsession with equal outcomes does not lead us to disregard these inhibitions, then we will still have to retain the liberal conception of the right to education as an opportunity to which all are entitled but which some may not use effectively, even when initial conditions of equality have been substantially realized.

(e) Certiorari has also been granted to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation. See, e.g., Bullington v. Missouri, 451 U.S. 430, 432 (1981) (certiorari granted on issue whether reasoning of prior Court precedent also applies to

different kind of sentencing procedure); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) (certiorari granted to determine "whether the rationale of Moore v. Illinois Central R. Co. carries over to a suit for severance pay on a contract" subject to federal law); Oregon v. Mathiason, 429 U.S. 492, 493 ( 1977) (certiorari granted because state court "has read Miranda too broadly"); Hankerson v. North Carolina, 432 U.S. 233, 240 (1977) (certiorari granted on issue whether state court correctly declined to give retroactive effect to prior Supreme Court decision).

(f) Certiorari may issue where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." Kosydar v. National Cash Register Co., 417 U.S. 62, 65 (1974). See also Smith v. United States, 431 U.S. 291, 293 (1977); Arizona v. Manypenny, 451 U.S. 232, 239 (1981).

The granting of Certiorari is clearly warranted in order to give substance to and accommodate the universal right to educational opportunity guaranteed under the U.S. Constitution and IDEA.

It is widely believed by the general public that there is a universal right to educational opportunity. While one might expect that a right of such evident importance would have been the subject of careful legal analysis and exposition, this turns out not to be the case at all. The Law does not give any indication of what the basis of the right to education is held to be, despite the fact that it is a fundamental right under the California Constitution Serrano v. Priest (1976) 18 Cal.3d 728, 767-768).

There have been almost no serious attempts by the State or Federal Courts to show just what is implied in the existence of a universal human right to educational opportunity or what rational justification there can be for the assertion that there is in fact such a right.

Perhaps one of the reasons why the right to education (in the form of actually being afforded an educational opportunity) has not been subjected to careful Judicial analysis is a deep-seated belief that the existence of such a right can be straight forwardly derived from more general laws. This is clearly not the case, as the desperate plight of Petitioners clearly shows.

Earlier cases have invoked the admittedly vague notion of a minimum or basic level of education to which everyone has a right; and this rather clearly suggested that beyond that level, one would either pursue one's education at one's own expense or no longer pursue a formal education. This is in fact not the view that Petitioners wish to advocate. Rather, the undeniable focus of this case is as to educational opportunity, and not in anyway advocating any sort of minimal outcome of Education to which California elementary school students are entitled. It is primarily this, that makes this case one of first impression for the U.S. Supreme Court.

Opportunities for education are to be offered to all on an equitable basis; and whether people make proper use of these educational opportunities is, by implication, their responsibility. But it is well known that even when these opportunities are offered, our ability to take advantage of these educational opportunities varies widely in a way that reflects the decisive importance of such influences as socio-economic status, the quality of family life, the medical and nutritional care a child receives and so on. The outcomes of education—the relative

success or failure of differently situated children to achieve the goals of education— certainly vary in a way that testifies to these influences (and this the State Appellate Court correctly noted); and many wrongfully draw the conclusion that the right to education, if it is to be at all meaningful, requires that all of these factors that influence educational outcomes be substantially equalized. Only then, it is argued, will the opportunity for education be really equal for all and the universal right to education, a reality. This is hogwash.

From such a wrongful view, it is only a step to the conclusion that a right to education based on the formal openness and availability of educational opportunity has little value and that the right to education must henceforth be construed as a right to equal educational outcomes, especially as between members of differently circumstanced racial and economic groups (On this point the Appellate Court was correct, although it very wrongfully misconstrued Petitioners case as advocating this position despite Petitioners' 150 page Brief to the contrary.) It is this extremely false and malignant reinterpretation of the notion of a right to

education that has plaqued Courts from putting the proper focus upon educational opportunity, and not outcome.

If the basic right to an education is well conceived, it would undoubtedly afford the elementary school student an actual opportunity to acquire the basic academic competencies to a degree that will permit him to use them effectively and to go on learning by himself in at least some areas. That is the essence of this case.

Stepping in this laudable direction, the U.S. Supreme Court should implement existing constitutional and statutory laws which already require that all elementary students receive a free, and now, appropriate educational opportunities as to basic academic skills. Kids simply deserve a real chance to learn their ABCs.

The U.S. Supreme Court should also re-evaluate the Federal law in light of the realities of our Information Age society and permit a cause of action against school districts whose conduct is based on bad faith attempts to deprive the students of an educational opportunity. No longer should government codes protect willful fraud on the part of Santa Ana School District employees. No longer should the U.S. Supreme Court condone,

through Judicial tolerance, the intentional infliction of emotional distress and the procedural and substantive violation of Federal Due Process inflicted daily upon children and parents by Santa Ana School District employees.

For these reasons and those set forth below, Petitioners should be allowed their day in our U.S. Supreme Court.

## II. STATEMENT OF THE CASE

On October 2, 1992, Lourdes Gutierrez filed a lawsuit against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The first amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorney fees.(CT. 58). On October 13, 1992, the District administrators' response to these allegations (per print media) was that students' academic problems stem from their disadvantaged backgrounds.

In fact, the District administrators went so far as to pat themselves on the back for a job well done.(CT. 103). (See Appendix II, ).

It is noteworthy (as it is quite rare) that the trial court judge felt this case important enough to accept a twenty five page policy argument document from Petitioners prior to the demurrer hearing.(CT. 224). (See Appendix III). However, on December 16, 1993, the trial court sustained the demurrers of the school district and Dr. Castruita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action lawsuit and failed to state any cognizable cause of action.

Petitioners appealed the trial court's ruling. The Fourth Appellate District affirmed by unanimous decision.

## III THE STATEMENT OF ISSUES

Did you know that your fifth-grader can be reading at a first-grade level and still get good grades?

And the California Appellate Court, Fourth District, says it's OK!

Did you know that teachers, schools and districts can lie to parents about their child's ability? The Court says that's OK, too!

But remember: it's against the law to not send your child to elementary school, no matter how negligent the education.

In the case of Gutierrez vs. Santa Ana Unified School District, the Court has held that there is no actionable standard of care in education. None. There is no actionable standard for teachers, administrators or districts.

In other words, no district, school or teacher can be held liable for negligence in teaching our children, no matter how poor the job, no matter how deprived the children, no matter how blatant the lack of professionalism.

If the School District sincerely believes your child is disabled, they do not have to tell you. They can even intentionally deceive you, and they are immune by the courts from any liability. You have absolutely no legal recourse.

The Court has held that as long as there is "equity in funding", no other test can be applied to the performance of a teacher, a school or a district!

Moreover, there is simply no accountability mechanism to compel any district, school, or teacher to instruct or assess our children in a non-negligent manner.

1) Some of the wrongful holdings by the Appellate Court in this case are as follows:

1. [Gutierrez urges us to disagree with *Peter W.*, arguing the issue is really a question of proximate cause for the jury, i.e., was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimed here is Petitioner's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." *(Peter W. v. San Francisco Unified Sch. Dist.*, (1976) 60Cal.App.3d 814.) ((But my case only goes to the teaching and administrative process)) We agree with the *Peter W.* court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process.] [Excerpt from the Appellate Court's ruling.] [Emphasis added.]

Please note that the Appellate Court's ruling is a vast extension of the Peter W. ruling in that this Appellate Court did not merely find no duty in teaching, but rather, the Fourth Appellate Court held that the entire bureaucratic administration in the academic phases is not accountable. This means that the Santa Ana School District is not only entirely unaccountable if they teach, what they teach, or how they teach, but are also unaccountable as to the assessment and identification of disabled students under IDEA or any other administerial aspect of a student's experience within the "public educational process."

Essentially, the Santa Ana School District has free and complete reign in how it conducts itself in the educational process. The Santa Ana School District is completely immune as to any legal accountability. This is wrong and immoral and unconstitutional.

2. [Gutierrez's second and third causes of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. *(Chevlin v. Los Angeles Community College Dist., supra,* 212 Cal.App.3d 382)] [Excerpt from the Appellate Court's ruling.] [Emphasis added]

This gives the Santa Ana School District authority to act with complete impunity as to deceiving both students and parents. This type of reasoning allows the Santa Ana School District to give illiterate elementary school students, like Elizabeth Esparza, A's and B's in reading and spelling when in fact they are in the bottom ten percent of the Nation according to the objective findings of the CTBS scores. These highly relevant CTBS scores are not mailed to the parents, although the meaningless A's and B's in reading and spelling are. Parents are intentionally deceived and thereby made fools of; and the State, according to the Appellate Court, has granted the Santa Ana School District complete immunity from any legal accountability as to these lies and deceptions regarding the true academic standing of their elementary school children. And, as the facts indicate, deception was one of the primary complaints by Petitioners. Where is the Justice?

3. [Although the right to an education is not guaranteed under the federal constitution *(San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution *(Serrano v. Priest* (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the right to equality of funding or access to education, not the level of quality. *(Ibid.; Buff v. State of California* (1992) 4 Cal.4th 668.)].

It should be obvious to anyone, that equality of funding has no inherent bearing whatsoever as to how the Santa Ana School District conducts its duties toward both elementary students and parents. Also, although the Appellate Court freely admits the fundamental right granted by the California Constitution at least means access to an education, it seems unable to freely admit that the quality of the access to educational opportunity is also relevant as to the elementary education one can hope to achieve.

Petitioners primary thrust, all along, has been to assert that the access afforded to elementary school students by the Santa Ana School District has been equivalent to a penitentiary, to which elementary school children are compelled by Law to attend. Elementary school are reduced to the status of a daily prisoner, when students are not afforded any real opportunity to learn even the most basic academic skills, such as reading, writing, and arithmetic. This daily deprivation of liberty, the educational property interest granted by the California Constitution, and the inherent Due Process afforded by both the State and Federal Constitution must cease!

4.[ Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing *DeShaney v. W nnebago Cty. Soc Servs. Dept.* (1989) 489 U.S. 189, she claims the students were deprived of liberty without due process. ... Compulsory school attendance laws do not create a special relationship between the student and the school.*(Graham v. Independent Sch. Dist.* (10th Cir. 1994) 22 F.3d 991, 994.)] [Excerpt from the Appellate Court's ruling.] [Emphasis added].

Basically, Petitioners argued throughout their extensive Appellate Brief, that it is both unfair, illegal, and immoral to compel elementary school students to an institution for six years, six hours a day, if they are not even afforded a real opportunity to learn even the most basic academic skills such as reading, writing, and arithmetic. On this pertinent issue, the Fourth Appellate Court is simply dead wrong in their nefarious assertion that a special relationship is not created by the California compulsory attendance laws; or in the alternative, if the Appellate Court is deemed right by this Supreme Court, then the compulsory laws compelling kids to the Dumbo Elementary Penitentiary should be abolished forthwith. That is only fair.

Also, as to deprivation of Due Process, Petitioners incessantly argued that they were deprived of liberty by being compelled to go to a school where they are not even afforded a chance to learn even the most basic academic skills.

Petitioners were also deprived of their Educational property interest as guaranteed by the California Constitution in that, to not afford elementary school students the opportunity to learn the academic basics in an Information Age is to damn them to economic deprivation and political impotence.

This is tantamount to theft from little kids. The only bauble California put in their pockets at birth was a crumpled IOU to come learn of life within our mighty Sequoias and of academics in our humble classrooms.

At minimum, there is a special relationship between a School District and their elementary school students such that a School District cannot:

1) engage in bad faith school-wide policies which deprive the elementary school students of the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and Section 504 of the Rehabilitation Act; and

2) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and

3) refuse to assess students when their parents request assessment; and

4) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and

5) fail to inform or, in fact, misinform parents of their children's progress by (a) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (b) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide; and

6) conduct in age promotion policy which pushes the students -- like herds of cattle -- to the next grade despite their illiteracy.

Lastly, let me, once again, make this perfectly crystal clear. Petitioners never ever argued that the Santa Ana School District is or should be in any way held responsible for the ills of society. Petitioners also never argued that the Santa Ana School District should in any way be held accountable for how a students "turns out" academically.

Petitioners only requested that the Appellate Court hold: The Santa Ana School District must only teach not poorly, only in elementary school, and only as to basic academic skills such as reading, writing, and arithmetic. Notice that Petitioners did not ever argue that the Santa Ana School District must even teach or administer itself well. No! No! No! Petitioners only only argued that the Santa Ana School District conduct its responsibilities not poorly. They only have to do their job not crappy. Yet even this minimal duty of care toward elementary school students the Appellate Court found "unworkable."

But what Petitioners have found "unworkable," is the present state of public education in Santa Ana. Urban public school systems, such as the Santa Ana School District, present a curious amalgam of inherent structural and ideological defects; it is no

wonder that they have failed to carry out even their own self-imposed regulations and duties.

Despite its promises, the panacea of Education has not reformed society.

The "professional" Educationists are mummies with framed paper, credentialed by Education departments from all around their self-referential world.

They have not won the allegiance of the poor and the black. The impoverished rightfully hate them, and when they grow up its all payback and graffiti.

They have not bound Americans to each other in affection and respect.

They have been erected first and foremost upon a soft, evasive intellectual base.

They have depended on a continued reluctance to compare their actual and official functions to their stated and operative purposes.

They have developed organizational structures that move them ever farther away from interaction with the communities they serve.

And, finally, they have even refused to accept responsibility for educating anybody successfully in anything. This the State Appellate Court has condoned and fostered in its protective decision:

"...Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." *(Peter W. v. San Francisco Unified Sch. Dist., supra, 60* Cal.App.3d at p. 824.) We agree with the *Peter W.* court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process. [Emphasis added]

Once granted a captive audience by compulsory attendance laws, they have had little need to succeed; it has been easier to develop a battery of excuses that place the blame for educational failure outside the school and on the home.

This is evil at its best, and with a smile.

## I. ROBERTO GUTIERREZ ARTICULATED CLEAR AND CONVINCING FEDERAL CONSTITUTIONAL CLAIMS IN HIS PLEADINGS BY APPLYING THE *RODRIGUEZ* CONCEPTUAL FRAMEWORK OF EDUCATION AS A RIGHT.

The usefulness of viewing the right to an education as a principle is evident in a consideration of the Supreme Court case San Antonio School District v. Rodriguez. Justice Thurgood Marshall, in his dissenting opinion, argued that the right to education is tied to constitutional rights in principle. In this view, the capacity to think critically is necessary if citizens in a democracy are to participate intelligently in the political life of the country and if other constitutionally protected liberties, such as freedom of speech, the freedom of association, and the right to vote, are to be meaningfully enjoyed. The inability to think critically is undoubtedly an extraordinary constraint in exercising one's liberties in a meaningful way. The inability of adults to make thoughtful choices, intelligent personal plans, and critical judgments upon public pronouncements clearly undermines the values of liberty and autonomy, upon which liberal democracies are based.

In the Rodriquez case, Mexican-American parents of children attending schools in Edgewood Independent School District in San Antonio, Texas, charged that the Texas school finance scheme was unconstitutional because far less money was spent on their children than was spent on children in other San Antonio school districts, and, thus, they argued that the Texas financing scheme violated the equal protection clause of the Fourteenth Amendment. One of the issues in the case was whether education was a constitutional right or not; if education was to be deemed such, the Texas scheme would be subjected to strict judicial scrutiny, and a heavy burden of proof would be placed on Texas to show a compelling interest in its financing scheme.

The majority of the Court held that "education is not among the rights afforded explicit protection under the federal Constitution." "Nor," Justice Lewis Powell asserts, "do we find any basis for saying it is implicitly so protected." Although the majority of the Court concluded that there was no constitutional right to education, the content of this conclusion is not readily obvious. What was it that there was no constitutional right to? Moreover, what kind of right was being denied? First, the Court

did not see itself dealing with a constitutional liberty, such as the right to free speech or the free exercise of religion. Rather, it viewed "the right to education" as a right to schooling. In this regard, Powell asserts:

> Even if it were conceded that some quantifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right (the right to free speech or the right to vote), we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.[1]

In Marshall's dissenting view, denying to education the status of a constitutional right oversimplifies and misrepresents the issue of its fundamentality, for the Court had previously protected other fundamental interests that were not explicitly or implicitly spelled out in the Constitution, including the right to procreate and the right to access to criminal appellate processes. The fundamentality of education as an interest lies, according to Marshall, in the "nexus between specific constitutional guarantees and the

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[1] *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972) at 30; at 33-34. It should be noted that attorneys for Texas frankly admitted that they could not show a compelling interest in Texas's financing scheme.

nonconstitutional interest." If this nexus is a close one, the nonconstitutional interest—in this case, education—becomes fundamental. Marshall acknowledges that " this Court has never deemed the provision of free public education to be required by the Constitution. " Nevertheless, his argument does underscore the fundamental interest citizens have in educational opportunities. According to Marshall, "the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded to public education in our society, and by the close relationship between education and some of our most basic constitutional values."[2]

Marshall's argument that the fundamental interest in education provides a guideline in determining how much scrutiny Texas's financing scheme deserves brings to light the distinction between how the right to education would function as a rule or as a principle. As a rule, the right to education would specify a particular kind of entitlement, and one could easily determine whether the state was or was not providing or honoring such an

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[2] Id. at 111.

entitlement. As a principle, the right to education would simply provide a general guideline for examining whether the state was or was not fulfilling its obligation to provide educational opportunities to people on a nondiscriminatory basis. Marshall's argument points to the flexibility to be gained in considering "the fundamental interest in education" not as a specific entitlement to a certain amount of schooling or to schooling at all.

The dissent did not go far enough in suggesting why the fundamental interest in educational opportunities qualified those opportunities to be regarded as a right of all citizens (though clearly not as the right to schooling; the right to educational opportunities is a broader principle than a specific entitlement to schooling). The justification for regarding the right to education as a legal principle lies in its intimate connection with other constitutionally protected values, including the right to free speech, the right to free association, the right to vote, and the general privilege of participating in the political processes.

## II. THE WILLFUL CONDUCT BY RESPONDENTS DEPRIVES ELEMENTARY SCHOOL STUDENTS OF DUE PROCESS, THE BENEFITS OF VARIOUS STATE AND FEDERAL STATUTES AND FUNDAMENTAL AMENITIES GUARANTEED BY BOTH THE CALIFORNIA CONSTITUTION AND THE CONSTITUTION OF THE UNITED STATES.

### a) As World History Clearly Indicates, To Not Afford Students An Educational Opportunity To Learn Basic Academic Skills In Elementary Schools Is To Cripple Them To The Status Of Second-Class Citizens, And Handicap Their Ability To Express Themselves Even Minimally In Political Expression And In Their Pursuit Of Livelihood And Happiness.

The tight relationship that exists between economic development, educational levels, and democracy is illustrated quite clearly in Southern Europe. In 1958, Spain embarked on a program of economic liberalization in which the mercantilist policies of the Francoist state were replaced by liberal ones linking the Spanish economy to that of the outside world. This led to a period of very rapid economic growth: in the decade before Franco's death Spain's economy grew 7.1 percent per year. It was followed closely by those of Portugal and Greece, which achieved

growth rates of 6.2 and 6.4 percent per year, respectively.[3] The social transformations brought about by industrialization were dramatic: in Spain, only 18 percent of the population lived in cities of over 100,000 population in 1950; by 1970, this figure had increased to 34 percent.[4] In 1950 half the populations of Spain, Portugal, and Greece were engaged in agriculture, compared to an average of 24 percent for Western Europe as a whole; by 1970 only Greece remained above that latter figure, while in Spain the percentage had dropped to 21. With urbanization came higher degrees of education and personal income, and an appreciation of the consumer culture that was

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[3] R. Hudson and J. R. Lewis, "Capital Accumulation: The Industrialization of Southern Europe?" in Allan Williams, ed., *Southern Europe Transformed* (London: Harper and Row, 1984), p. 182. See also Linz (1979), p. 176. These were higher growth rates than either the six original members of the EC, or the nine members, after the community underwent its initial expansion, in a comparable period.

[4] John F. Coverdale, *The Political Transformation of Spain after Franco* (New York: Praeger, 1979), p. 3.

being created within the European Community. While these economic and social changes did not in themselves bring about greater political pluralism, they created the social milieu under which pluralism could flourish once political conditions became ripe. The Francoist commissar of the Plan for Economic Development who oversaw much of Spain's technocratic revolution, Laureano Lopez Rodo, was reported to have said that Spain would be ready for democracy when per capita income reached $2000. This proved quite prophetic: in 1974, on the eve of Franco's death, per capita GDP stood at $2,446.[5]

A similar linkage between economic development and liberal democracy can be seen in Asia. Japan, the first East Asian state to modernize, was the first to achieve a stable liberal democracy. (Japan's democratization was accomplished at the point of a gun, so to speak, but the result proved durable long past the point where democracy could be said to have been imposed coercively.) Taiwan and South Korea, with the second- and third-highest levels of education and per capita GNP, have experienced the greatest

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[5] Linz (1979), p. 176.

change in their political systems.[6] In Taiwan, for example, 45 percent of the ruling Guomindang party's Central Committee have higher educational degrees, many of them earned in the United States.[7] Forty-five percent of Taiwanese and 37 percent of South Koreans receive some higher education, compared with 60 percent of Americans and 22 percent of Britons. And indeed, it is the younger, better educated members of Taiwan's Parliament that have pushed the most strongly to make it a more representative institution. Australia and New Zealand, those lands of European settlement in Asia, had of course modernized economically and democratized well before World War II.[8]

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[6] Coverdale (1979), p. 1.

[7] "Taiwan and Korea: Two Paths to Prosperity," *Economist* 316: 7663 July 14, 1990), p. 19.

[8] In the early 1960s Peter Wiles pointed out that the Soviet Union was beginning to educate its technocratic elite according to functional rather than ideological criteria, and that this would eventually make them understand the irrationality of other aspects of their economic system. See *The Political Economy of Communism* (Cambridge, Mass.: Harvard University Press, 1962),

Russia as well has been undergoing a comparable social transformation, though at a slower pace than the countries of Asia. It too has changed from an agricultural to an urban society, with increasing levels of mass and specialized education.[9] These sociological changes, going on in the background while the Cold War was being fought out in Berlin and Cuba, were conditions that encouraged the steps subsequently undertaken toward democratization.

Looking around the world, there remains a very strong overall correlation between advancing socio-economic modernization, high-levels of education and the emergence of new democracies. Traditionally the most economically advanced regions, Western

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p. 329. Moshe Lewin has made a great deal of urbanization and education as the ground for *perestroika.* See *The Gorbachev Phenomenon: A Historical Interpretation (* Berkeley, Calif.: University of California Press, 1987).

[9] Most of this literature, however, discusses how education qualifies people for democracy and aids in its consolidation, rather than explaining why education should predispose people toward democracy.

Europe and North America, have also hosted the world's oldest and most stable liberal democracies.

The only apparent regional anomaly is the Middle East, which possesses no stable democracies, and yet contains a number of states with per capita incomes on a European or Asian level. But this is easily explained by oil: income from petroleum has permitted states like Saudi Arabia, Iraq, Iran, and the UAE to acquire the trappings of modernity—automobiles, VCRs, Mirage fighterbombers, and the like—without having had their societies go through the social transformations that come when such wealth is generated by the labor of their populations.

b) Specifically, Advancing Industrialization Produces Liberal Democracy Because An Essential Key To Modern Industrialization Is A Skilled, Educated Work Force.

The most powerful line of argument linking economic development with liberal democracy is that successful industrialization produces middle-class societies, and that middle-class societies demand political participation and equality of rights. Despite the disparities in income distribution that

frequently arise in the early phases of industrialization, economic development ultimately tends to promote the broad equality of condition because it creates enormous demand for a large, educated work force. And such a broad equality of condition arguably predisposes people to oppose political systems that do not respect that equality or permit people to participate on an equal basis.

Middle-class societies arise as a result of universal education that affords real opportunities to learn. The link between such an education and liberal democracy has been frequently noted, and would seem to be an all-important one.[10] Industrial societies require large numbers of highly skilled and educated workers, managers, technicians, and intellectuals; hence even the most dictatorial state cannot avoid the need for both mass education and open access to higher and specialized education if it wants to be economically advanced. Such societies cannot exist without a

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[10] In developed countries one obviously finds under-employed Ph.D.s who earn less than real-estate developers with high-school diplomas, but by and large there remains a high correlation between income and education.

large and specialized educational establishment. Indeed, in the developed world social status is determined to a very large degree by one's level of educational achievement.10 The class differences that exist in the contemporary United States, for example, are due primarily to differences in education. There are few obstacles to the advancement of a person with the proper educational credentials. Inequality creeps into the system as a result of lack access to education; lack of education is the surest condemnation to second-class citizenship.

The effect of education on political attitudes is complicated, but there are reasons for thinking it at least creates the conditions for democratic society. The self-professed aim of modern education is to "liberate" people from prejudices and traditional forms of authority. Educated people are said not to obey authority blindly, but rather learn to think for themselves, to think critically. Education also makes people demand more of themselves and for themselves; in other words, they acquire a certain sense of dignity which they want to have respected by their fellow citizens and by the state. In a traditional peasant society, it is possible for a local landlord (or, for that matter, a communist

commissar) to recruit peasants to kill other peasants and dispossess them of their land. They do so not because it is in their interest, but because they are used to obeying authority. Urban professionals in developed countries, on the other hand, can be recruited to a lot of nutty causes like liquid diets and marathon running, but they tend not to volunteer for private armies or death squads simply because someone in a uniform tells them to do so.

Educational opportunity is crucial in sustaining a stable democracy, and elementary students should be afforded such a critical opportunity. To hold otherwise, as the Appellate Court did, is to deprive Petitioners of Due Process, specifically of their Liberty interest by being legally compelled to attend an elementary school where they are not even afforded a chance to learn basic academic skills. Petitioners are also being deprived of their Educational property interest as guaranteed by the California Constitution in that to not even be afforded the opportunity to learn the academic basics in an Information Age is to damn these elementary school students to economic deprivation and political impotence.

## III. THIS CASE DEALS WITH POLICY ISSUES THAT ARE CLEARLY INSTITUTIONAL, THE SIGNIFICANCE OF WHICH IS GUARANTEED TO AFFECT VARIOUS AND INTEGRAL RIGHTS OF OTHER ELEMENTARY SCHOOL STUDENTS IN OTHER CASES

"Institutional" (public policy) issues relate to the very purposes of education. It must be emphasized that, opinion to the contrary notwithstanding, people ask no more of schools today than they did a hundred and twenty-five years ago. Even then the schools were asked to do the impossible. The purpose, back then and now, of the "public educational process" always has been more the development of attitudes than of intellect, and this continues to be the case.

It is clear that the powers of schooling have been vastly overrated. Despite substantial financing and a captive audience, the schools have not been able to attain the goals set for them, with remarkably little change, for the last century and a quarter. They have been unable to do so because those goals have been impossible to fulfill. The "public educational process" requires fundamental social reform, not the sort of tinkering that educational change has represented.

The moral should be clear. The U.S. Supreme Court must begin to distinguish between what formal schooling can and cannot do. This Supreme Court must separate the teaching of skills from the teaching of attitudes, and concentrate on the former. In actual fact, it is of course impossible to separate the two; attitudes adhere in any form of practice. But there is a vast difference between leaving the formation of attitudes untended and making them the object of education.

In the popular fairy tale of school-time Past, schools once upon a time concentrated on the three R's. With no nonsense and remarkable success, they taught children to read, write, cipher, and spell. Then along came progressivism, which turned the schools into a combination social-service and life-adjustment bureau, forgetting, in the process, all about training in skills and the importance of the intellect. That history is simply false. The denigration of intellect and the neglect of skills have been continuing features of the history of public education; early school promoters believed quite as much as progressives that they were creating institutions to alleviate and prevent social problems.

The way out of this problem is once again to take the schools out of the business of making attitudes. Have them attend to skills, especially, in the beginning; and the question of whose values control the schools becomes largely irrelevant. For it is my premise that the desire that children become functionally literate and able to understand mathematics is nearly universal; it is as true of poor as of affluent parents.

To talk of cultural deprivation is to patronize the poor; it also is to deflect effort away from the education that they need. Poor children need to learn to read, not to visit museums, and I have seen no evidence of a correlation between the two.

People have a right to hold whatever beliefs and whatever attitudes they please; that is the only consistent position for a civil libertarian. It follows that the attempt in schools to define one set of attitudes as superior to another, the attempt to teach patriotism, conventional morality, or even its opposite in a compulsory public institution represents a gross violation of civil rights.

My point is that educational law should define strict educational tasks and that schools should concentrate on those. Any such definition must include, at one end of the spectrum,

fundamental skills; at the other, it must exclude the conscious attempt to formulate social attitudes. Schools should be made open, humane places for the simple reason that children have every right to be happy and to be treated with dignity and respect.

Petitioner's requested holding will undoubtedly include a shift of power to teachers and students, away from administrators and bureaucrats. For decentralization from the law to bring about improvements, the teacher as well as the school must be liberated. (a legal duty from the school will liberate the teacher to carry out the legal responsibility of the school district.)

Professional educationists can offer a great deal of assistance, but the days when they should offer blueprints have ended. Let us be thankful, for that system has brought us to where we are: Too many children do not learn well and are unhappy in school; teachers suffer and lack autonomy; parents are dissatisfied; and economists warn of impending massive unemployment. Not even a college degree assures one a job any more. Aside from the bureaucrats who feed off the education system, and I do not mean the teachers, it has served no one very well. We are all its victims, and no one has done very much constructive about that for the

last century. I should like to think that the time has come for Petitioners to have their day.

## IV. THE REQUESTED LAW WILL TRANSFORM SCHOOLS BY AFFORDING ALL STUDENTS THE EDUCATIONAL OPPORTUNITIES GUARANTEED BY STATE AND FEDERAL LAW.

a) The Court's ruling will transform the unconstitutional Santa Ana School District,

for the power of the Law lies in the details. Here's how:

The successful School District is the School District that organizes itself as a learning system in which every part is designed to promote and accelerate both individual learning and collective learning—and to put that learning to productive use.

For fifty years or more, every reform in American education, from the Master of Arts in Teaching degree to the "new math", from parent participation to team teaching, has been based on the premise that the basic organizational and management structure need not change. The only important exception, educational vouchers, is an off-centered attempt to strike at the heart of the problem. All of the earlier reforms in curriculum, teaching method, and school organization have ultimately disappointed their advocates. All have been rejected or watered down in the course of time by the larger system, which seems impervious to any real changes at all. It is the system that is the problem, and

only basic legal changes toward the structure of the system will fix it.

The most striking feature of our schools is that the quality of the students they graduate is mostly a function of the background of the students they enroll. Schools that enroll wealthy students produce accomplished graduates and those that enroll students from low-income families typically produce students with poor academic records. We think of the first set as good schools, but there is no reason to do so. A truly good school would be one that graduated students who are more successful than would be predicted by their social class.

Now here is the curious thing. One would think that schools with better results than could be predicted by the social class of their students would be widely imitated, that successful programs of any sort would be quickly identified by school boards and superintendents, copied instantly, and quickly improved upon. But nothing of the sort actually happens, as countless innovators, philanthropists, and government planners have discovered. Through decades of educational history in this country, programs of unquestioned effectiveness have spread very slowly, if at all. In

fact, teachers and principals who have achieved such successes have often done so as renegades within their districts, and are given the cold shoulder by their colleagues and superiors.

The reason is not hard to find. Success in educating students is not reflected in the pay of teachers or principals, nor is it rewarded with opportunities for advancement in the system. These facts are merely indicators of a broader problem. School districts are not performance-oriented organizations. There is no bottom line and there are no rewards for achieving it. Superintendents are the only people in the entire system who can be fired without going through numbingly complex procedures. What a superintendent most fears is anything that will result in a controversy that will appear in the press and provide an excuse for a board member to threaten his or her control of the system or job security. The way to minimize such controversy is to make sure, first and foremost, that everyone in the system is loyal—to the person in the hierarchy above and, ultimately, to the superintendent.

Loyalty to the system, <u>not contribution to student performance</u>, is thus the primary criterion for success in the schools. That is why new methods of proven effectiveness are so often ignored. If

implementing the innovation is likely to arouse the wrath of anyone inside or outside the system, it is quietly shelved, along with the person who promoted it. The system's primary obligation is not to its students, but to itself.

Imagine now that school districts were organized and managed in such a way that everyone in them was striving constantly to improve student performance. A system for doing just that is the first of three keys to producing a world-class education system in the United States. The other two keys are the creation of systems of educational standards and of incentive systems that reward all the participants when those standards are achieved.

Petitioner's goal is to make an enormous improvement in educational achievement at a modest increase in cost. We need to start by being very clear about what business School Districts are in. We must have our goals straight and clear. This court must mandate what every excellent business already does: The Law will give incentive for the School District to communicate its goals of non-negligent instruction to everyone in the organization, and make damn sure that everything top management does reinforces those goals so that no one could forget them. In order to avoid

legal liability the School District will be prompted, as lawyers and doctors have been prompted by the possibility of malpractice, to find measures of progress against those goals of non-negligent instruction that reflect what they want to achieve.

The School District will undoubtedly change their incentive systems so that there will be real rewards for performance and real penalties for nonperformance, and personal accountability will create strong incentives to contribute to the School District's goals. The School District will make major investments in new systems to give teachers the skills, time, and information they would need to function in the new environment. Then the School District will push a lot of decisions that had been made by middle and top management down to the front line, to those people closest to the customer--the student. And the School District, can then rightfully, hold those on the front line accountable for the results of their work, having gotten rid of as much as possible of the bureaucracy that used to be there to tell the lower levels what to do and how to do it.

Pushing decisions down to the elementary school level puts a premium on the quality of school staff, particularly teachers. But

today, in a Taylorist system like the public schools, it makes very little sense to invest heavily in the recruitment, selection, and training of front-line staff—in this case teachers. After all, teachers are interchangeable parts, not to be relied on for independent judgment, there to do as they are told. Teacher compensation systems are very revealing in that respect. After teachers reach about twelve years of service, they typically get only cost-of-living raises. After that point, the system reasons, it is cheaper to get two new teachers who'll be just as effective. This is hardly the view one would take if one valued the professional competence of teachers as we value the professional competence of lawyers, architects, or accountants. It is the way we view counter-workers in a fast-food restaurant.

From this we can reasonably conclude that teachers are <u>not</u> regarded by the Santa Ana School District as the key to the success of schools, all the rhetoric to the contrary notwithstanding—<u>management is</u>. But in a transformed environment as mandated by Law, everything will depend on the capacity of the teachers and school-level administrators to exercise independent judgment with a high degree of <u>professionalism</u>. So

it makes all the difference who is hired, how they are initially trained, and what provisions are made for their continued development through their whole career in education.

Given the urgency of the requirement to build a new system for teacher recruitment, selection, and hiring, the requested Law would do this by creating an immediate incentive to have teachers who teach basic academic skills to elementary students in a non-negligent manner.

This incentive must come from outside the system, from the Courts. Only this Supreme Court can initiate what needs to be done, since the School District is presently a legally unaccountable public agency, and adamantly refuses to pick up the gauntlet and carry out its duties towards elementary school students in a non-negligent manner.

The reasons for this willful refusal are all too clear. First, the Santa Ana School District is a public agency operating in a political fishbowl, making it far harder for the chief executive officer (the Superintendent) to formulate a plan and execute it. Second, while private employees were often willing to make fundamental changes in the organization because the alternative

would be bankruptcy and unemployment, no one in the Santa Ana School District seems to believe that anything would happen to them if the District fails and remains inherently incompetent. Thus, there is no true incentive to take the tough measures needed to guarantee elementary school students the real opportunity to learn basic academic skills. Only this Supreme Court's ruling will change this immediately, and effectively.

The Supreme Court's ruling will guarantee School District's establish responsibility for planning and policy related to restructuring and to put in place a management system that would establish priorities, assign tasks, allocate resources, track their progress, and make corrections along the way to make damn sure little kids get a real chance to learn the basics.

The approach to restructuring here must depend heavily on creating a new organizational culture within the school district, a compound of new values and new skills. The overriding value for every school district in California must be: "All Kids Can Learn," and the companion goal of creating a school district in which the academic achievement of the students cannot be easily predicted by the incomes of their parents.

One of the major differences between a manufacturing firm and schools, of course, is the fact that the material with which the professionals work consists of people, namely students, not inanimate objects. One of the major problems facing urban school districts is the belief on the part of many students that no one no--adults in the school at least--care very much about them or believe in their capacity to succeed. This is why this Supreme Court must emphasize in its decision over and over again that "All Kids Can Learn." In business terms, school districts must believe that their first obligation is to their "customers," conceived as the students; to "quality," defined as meeting the needs of those customers; and to "zero defects," defined as a situation in which all students achieve educational opportunities at high qualitative levels.

But, just as in business, belief without action is of little value. There can be no doubt that if this Supreme Court enacts the legal accountability, it will see immediate and beneficial results for kids who want to learn. Undoubtedly, school districts will negotiate a provision in the teachers' contract providing for a district-wide policy requiring secondary-school teachers to take personal responsibility for a group of students, keeping track of their

academic progress in all their courses, and being in regular touch with their parents. Although many teachers will take the view that they never signed up to be social workers, many others will agree with the aims of the program emanating from this Supreme Court's decision. Do not forget, teachers are not bureaucrats. Most of them do really care about teaching kids. If the school districts move toward improving the educational opportunities they afford their elementary students, parents will follow in kind. No parent wants their child to miss the educational opportunity to be learned and literate.

The community of Santa Ana's aspirations for its children are as high as those of any other community. Their expectations, on the other hand, are very low. And why shouldn't they be, their kids are not being given a real chance to learn even the basics such as reading and writing. Where there is a will, there is not necessarily a way. Through the light of Good Law, this Supreme Court shall emblazon that way, and the children and parents of Santa Ana will follow Your lead!

Now is the time to help elementary students, for what keeps the rhythmic cycle of education in motion is the lure of value to be

obtained. The value cannot all be eventual, however. Life is lived and its various values are concurrently interrelated along lines of a continuous present. The charm of basic academic skills lies in its immediacy, its direct appeal, the significance and flavor that it gives to the student's present moment. Where the element of reading writing and arithmetic is unattained, more complex values and meanings have no foundation, and true generality of viewpoint is difficult if not impossible. In short, life is underlived.

It is by thinking ably that we are able to translate ideals into realities, to adapt our environment to what we conceive will be more conducive to survival and progress. Language and mathematics as means of communication and classification are essential skills, if we are ever to recognize order in our experience or connect probable consequences with present decisions. The children of Santa Ana need Your help, now. Not tomorrow.

now

# CONCLUSION

Thus, at present, the Laws seem to indicate that the supposed American commitment to universal public education is, in fact, nothing more than a congregational recitation of unexamined slogans and unenforced federal statutes. We do not know what we mean by an education, because we have not examined the language in which we describe it. We have not examined that language because we are not in the habit of examining language. We are not in that habit because we have been corporately educated in a system in which the critical examination of language and the skills required for that examination are less and less taught. They are less and less taught because they are less and less to be found among those who teach and those who direct the course of education. They are less and less to be found because people who do have the skills of critical thought and clear language are not likely to waste them by going to work in an institution founded on the recitation of unexamined slogans. It takes some kind of a fool to spend his life in the maximization of potential through the application of sets and subsets of actions

aimed at the translation, transformation, and organization of matter into meaning for individuals and groups. Only the thoughtless can pompously tell themselves about things like behavior modification and catalytical non-disciplines and preassessment instruments. No one skilled in language and thought could keep his sanity in that world of empty jargon, where he would find himself set to the task of pretending to clarify fictitious values and enhancing the self-esteem of the utterly unskilled by preaching that a positive self-image is more important than a clear sentence. In short, as Nietsche's first page quote so aptly describes,, the land of public education provides a happy home only for those in whom the skills of language and thought are but poorly developed. When linguistically skilled persons do wander into that world, they must soon either leave it or withdraw into the privacy of their own classrooms and learn to ignore everything else. They are strangers in a strange land where the natives speak no rational tongue at all.

The absence of a rational language is necessary to the peace of that system. Its unreason provides pretended answers to the questions we might ask about incentive. We ask, Just why do you

want to succeed in teaching the young? They answer: Because we are professionals committed to excellence and quality instuction (not minimal outcome!). What is "quality education"? Here are the answers of a widely read educator. It is an education in which, "students are taught to appreciate cultures other than their own and to perceive themselves in a positive light. In addition, they are encouraged to express their feelings openly and honestly, to develop and maintain good interpersonal relationships and to question basic Ideas."

This is a pile of crap.

These empty slogans were put forth in defense of the schools against the charge of failing to teach elementary skills of reading and writing. In what language then will those students "question basic ideas"? How will they know them when they see them? Will they ever question the basic ideas implicit in "appreciating" cultures and perceiving themselves in "positive lights"? These are not, it is important to note, the words of an eccentric educator swimming against the tide. They express the orthodox creed. The robe of education in our time is a scanty garment; most of it is lunatic fringe.

A line runs from the meditations of the heart to the words of the mouth. The meditations are not clear to us until the mouth utters its words. If what the mouth utters is unclear or foolish or mendacious, it must be that the meditations are the same. But the line runs both ways. The words of the mouth will become the meditations of the heart, and the habit of loose talk loosens the fastenings of our understanding.

Sometimes we all know that. When a functionary of our government tells us that his previous statements have suddenly become "inoperative," we see that what has been committed is not a euphemism but an immorality. While pretending to admit to the truth, the word evokes a world that never was, a world in which sentences that were once "true" now become, through some random twitch of history, not exactly "false" but at least ineffective, like an engine that used to start but does not anymore now that the weather has turned cold. One may snicker and even sneer at the man who tells us that his words have now become "inoperative," but he still has a victory. He has put that tiny worm into our ears. It will eat its way into our brains and dull some power of language, so that when his successors later talk to us

about "enhanced linguistic devices" we may sneer and snicker less. When enough of those worms have made their homes in our skulls—how long do you suppose that will take?—the day will come when we merely nod.

And from nodding we will go to dozing, and from dozing, to sleep. The U.S. Supreme Court must wake-up this Nation to the unConsitututionality in any lower court holding that, "there is no actionable duty of care in those who administer the academic process of the public educational process." [Excerpt from State Appellate Court's ruling] [Emphasis added]

You are the Brethren, of Justice. Please act accordingly, and as importantly—swiftly.

* * * * * *

Thus I came to you, O men of today, and into the land of education.... But what happpened to me? For all my anxiety I had to laugh. Never had my eyes beheld anything so dappled and motley. I laughed and laughed while my foot was still trembling, and my heart no less. "This is clearly the home of all paint pots," I said...

--Nietzsche, Thus Spoke Zarathustra[11]

* * * * * *

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[11] Nietzsche, *The Portable Nietzsche* (New York Viking, 1954), p. 231.

(2)

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1451

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

Class of Lourdes Gutierrez, et. al.,
Petitioners,

v.

Santa Ana School District,
Rudy M. Castruita, Superintendent,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

# RESPONDENTS' BRIEF IN OPPOSITION

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## SUMMARY OF ARGUMENT/STATEMENT OF THE CASE

This case focuses exclusively on the effectiveness of public education, a matter reserved for the states. It poses the single question, long settled by California appellate law, of whether public school districts have liability in tort when their students fail to learn. All three California appellate decisions on this subject agree that school districts have no liability in tort for educational malfeasance. The social, political, economic and philosophical debate on the effectiveness of public schools is simply not legally significant. There is no federal question; there is no significant legal issue. This Court has no choice but to deny certiorari.

Petitioner Lourdes Gutierrez' class action lawsuit seeks money damages in tort against the Santa Ana Unified School District ("District") and a court order to close a public elementary school and divert state funds to the parents of the students on the erroneous theory that all students of Glenn Martin Elementary School have allegedly been "wrongfully and unlawfully" uneducated.

The Orange County Superior Court sustained the District's demurrer on the ground that the complaint failed to state a cause of action. The Court of Appeal affirmed and the California Supreme Court denied review. The decision merely reiterates established state law that educational malfeasance is not actionable. Under California law, there is no duty of care, as a matter of law and public policy, in the discharge of academic functions which would expose a school district to liability in tort. In the leading case, Peter W. v. San Francisco

Unified School District, 60 Cal.App.3d 814 (1976), the Court stated:

> Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might--and commonly does--have his own emphatic views on the subject. The "injury" claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.
>
> . . . . . .
>
> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable "duty of care," in the discharge of their

> academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers.

Id. at pp. 824-825.

To circumvent the refusal of California courts to establish tort liability for a failure to educate, Petitioners alleged a number of other causes of action, including misrepresentation, breach of contract, and constitutional violations. The Court correctly concluded that these causes of action were merely educational malpractice actions in thinly veiled disguise. Petitioners cannot create a non-existent legal theory of action merely by calling it something else.

Finally, Petitioners appear to raise issues under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1400 et seq.) and Section 504 of the Vocational Rehabilitation Act (29 U.S.C. § 794), which are federal statutes. However, this case presents no questions for this Court because Petitioners cannot state a cause of action under those statutes. Petitioners did not exhaust their administrative remedies as set forth in the IDEA as a prerequisite to filing a court action. Similarly, Petitioners, identified in the first amended complaint as all of the parents and children enrolled in Glenn Martin Elementary School, have not and cannot allege that they are disabled as that term is defined under the Rehabilitation Act. Thus they lack standing to sue under Section 504.

This case presents no federal question and is not legally significant. Certiorari must be denied.

**THIS CASE PRESENTS NO BASIS FOR SUPREME COURT REVIEW**

The United States Supreme Court accepts for review only cases involving important federal questions with broad public policy implications. This case does not begin to meet that test. It focuses exclusively on public education, an area reserved for state law. The decision in this case merely reiterates established California law that a public school district cannot be liable in tort for the alleged failure to teach students to read. Peter W. v. San Francisco Unified Sch. Dist., supra, 60 Cal.App.3d 814; Keech v. Berkeley Unified School Dist., 162 Cal.App.3d 464 (1984); Chevlin v. Los Angeles Community College Dist., 212 Cal.App.3d 382 (1989).

Rule 10 of the Rules of the Supreme Court of the United States sets forth specific reasons for which the Court will grant certiorari. None of those reasons applies here. The petition in this case challenges a state court decision, not a decision of a United States Court of Appeal. The state court in this case did not decide a federal question at all, much less in a way that conflicts with decisions of this Court or any other court. There is no basis for granting certiorari.

Petitioner's stated grounds for review, set forth in pages 5 through 9 of the Petition, are as follows:

> (a) a conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari.
>
> . . . . . .
>
> (b) Even despite the absence of a conflict, state

court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is sufficiently important.

. . . . . .

(c) Where a state court has decided a substantial and unsettled federal question arising under the Constitution and has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court should grant the petition for certiorari despite the absence of a conflict.

. . . . . .

(d) Where a state court has relied upon a prior Supreme Court decision, or a constitutional principle previously established by the Court, that is now considered ripe for reconsideration and possible overruling or change, certiorari may be granted.

. . . . . .

(e) Certiorari has also been granted to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation.

. . . . . .

(f) Certiorari may issue where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution."

The briefest consideration of these grounds underscores the unsuitability of this case for review by this Court.

A. This Case Presents No Conflict Between A Decision Of the Highest State Court And A Supreme Court Decision On A Matter Of Federal Law

The question for the court in this case is whether a public school district has liability in tort for failing to teach a student to read. This is a state question, not a matter of federal law, and has been settled definitively in three California appellate court decisions. Even were it a federal question, however, there are no California or United States Supreme Court decisions on this issue. Therefore, this Court has no reason to grant certiorari.

B. The Decision In This Case Does Not Involve The Construction And Application Of Federal Statutes Or Treaties

As his second justification for review by this Court, Petitioners allege that "Respondents' bad faith school-wide policies deprive the elementary school students of the educational opportunity" under the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act. (Petition, p. 6.) Even if this statement were true, which is not the case, Petitioners cannot litigate these federal causes of action in state or federal court because they failed to meet the threshold requirements under the IDEA for bringing the matter to court.[1/] Moreover, as a class defined in the complaint as all

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[1/]To initiate a class action under the IDEA plaintiffs must allege the following: (1) all class members are disabled within the meaning of the IDEA as implemented by the California Education Code and the implementing regulations. Education Code section 56000 et seq.; California Code of

the parents and students of Glenn Martin Elementary School, Petitioners have not alleged, nor can they, that they are "disabled" as that term is defined in the Rehabilitation Act. (34 C.F.R. § 104.3 (j).) Therefore, they have no standing to sue under Section 504. That is why the Superior Court judge sustained Respondents' demurrers without leave to amend and why the Court of Appeal affirmed.

### C. The Court In This Case Did Not Decide A Substantial And Unsettled Federal Question

The Court in this case reiterated long established state law precedent that a California public school district has no liability in tort for failing to educate its students. This is not a federal question, nor is it unsettled. Petitioners' attempt to disguise their educational malpractice case as a violation of equal protection and due process is not effective. The Court of Appeal stated that these trumped up constitutional causes of action boiled down to educational malpractice and were not actionable. Opinion by the Fourth Appellate District, California Court of Appeal ("Opinion"), See pp. 9-12 of **Appendix to Respondents' Brief in Opposition** for the full text of the Court of Appeal Opinion in this case. Petitioner's Appendix is inaccurate and misleading because it does not include the full text of the Opinion.

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Regulations, title 5, section 3030 et seq.; (2) all class members have exhausted their administrative remedies, or to do so would be futile; and (3) all class members are aggrieved parties as a result of the findings and decisions of a due process hearing. 20 United States Code section 1415, subdivision (e)(2).

D. The Court In This Case Did Not Rely Upon Any Prior Supreme Court Decision Now Ripe For Reconsideration

The Court of Appeal in this case relied exclusively for its decision upon three other California appellate decisions, not upon a decision of this Court. Moreover, Petitioner cites to no prior Supreme Court decision which is ripe for reconsideration. Respondents are puzzled as to why Petitioner chose this ground as a basis for review in this case.

E. The Court In This Case Relied Primarily Upon State Appellate Law, Not Supreme Court Decisions

As discussed above, the Court in this case relied upon state law precedents holding that educational malpractice is not actionable, not Supreme Court decisions. The Court rejected Petitioner's "jumble of state and federal constitutional violations" and found that these causes of action "all boil down to a claim for inadequate education." See Opinion, **Appendix to Respondents' Brief in Opposition**, p. 9.

In finding that Petitioners' constitutional causes of action fail to state facts sufficient to be actionable, the Court of Appeal properly interpreted and applied federal case law, including Supreme Court decisions. The Court of Appeal affirmed the sustaining of the demurrer to the cause of action for violation of the equal protection clause because Petitioner had not and could not allege the essential element that persons similarly situated are singled out for unequal treatment on an impermissible basis. The Court of Appeal pointed out that "Gutierrez has failed to

allege that Roberto and the class are treated differently from students similarly situated within the District. . . . When a handicapped child does not allege that he has been singled out or treated differently from the nonhandicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." Opinion, **Appendix to Respondents' Brief in Opposition**, p. 10, quoting Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986).

In ruling that Petitioners had failed to allege violation of a fundamental right, the court properly relied upon San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35-36 (1973) for the proposition that education is not guaranteed under the federal constitution. Under California law, the fundamental right to education has been interpreted by the California Supreme Court as the right to equality of funding or access to education, not the right to a particular standard or quality of education. Serrano v. Priest, 18 Cal.3d 728, 767-768 (1976); Butt v. State of California, 4 Cal.4th 668, 686 (1992). See Opinion, **Appendix to Respondents' Brief in Opposition**, p. 11. Petitioners' argument that they have a fundamental right to a particular standard of education is not supported by state or federal law.

Petitioners' due process cause of action is not actionable because Roberto and his fellow students were not denied an education. Petitioners' challenge to the quality of their education does not reach a constitutional level under either state or federal law.

The court in this case followed without comment all of the Supreme Court cases it cited in its decision in this case,

including San Antonio Independent School District v. Rodriguez, 422 U.S. 1 (1973), the case Petitioners cite so frequently. There is no conflict, no legal debate between state and federal courts, no issue of legal significance. There is no basis whatsoever for certiorari.

F. The Decision In This Case Presents No Important Questions Touching The Accommodation Of State And Federal Interests

This case, as argued by Petitioners, touches on state and federal issues. But the issues are of no legal significance. As discussed above, the causes of action based on the IDEA and Section 504 of the Rehabilitation Act fail on their face because Petitioners did not exhaust their administrative remedies nor meet other threshold requirements for filing a lawsuit under those statutes. (See discussion of constitutional issues under Section E above.)

**THE QUESTIONS PRESENTED BY PETITIONERS DO NOT MERIT SUPREME COURT REVIEW**

Petitioners present five confused, rambling issue statements, which further emphasize the inappropriateness of certiorari in this case. (Petition, p. ii - v.) Moreover, as discussed below, many of these "questions" are not raised by the case.

*Question* 1. *Does the U.S. Constitution grant elementary school students the chance to acquire the academic building blocks, which would then enable them the genuine opportunity to participate in the political, social and economic*

*processes of our society?*

This case does not raise the question of a child's chance or opportunity to receive a public education. All of the Petitioners who were minors were attending classes in Glenn Martin Elementary School. That is how the class was defined. Petitioners attempt, however, to go beyond the chance for an education and ask this Court somehow to improve the effectiveness of public education through a legal ruling. That question is beyond the jurisdiction of this Court.

*Question 2. Despite the Rowley decision, the U.S. Supreme Court has never adequately defined what exactly is an educational benefit. Such exactitude is necessary for a proper analysis of what exactly is to be conferred upon disabled, elementary school students.*

This is not the case to bring this particular question before the Court, even if the Court had jurisdiction to define "educational benefit." Petitioners include all of the parents and all of the students at Glenn Martin Elementary School. They are not all disabled as defined by the IDEA and Section 504 and they did not exhaust their administrative remedies. Thus they cannot raise issues under these two statutes. This Court cannot reach question number 2.

*Question 3. Although the United Supreme Court has carefully declined to address the issue of whether Section 504 creates a private right of action, the Circuit Courts of Appeal which have addressed the issue have uniformly upheld existence of such a Right. Clarity is needed on this issue.*

Once again this case does not present this particular issue to the Court. In order to establish a claim under Section 504 of the Rehabilitation Act, Petitioners must allege that (1) the District receives federal funds; (2) all class members are individuals with disabilities as that term is defined under the Rehabilitation Act, and that they are otherwise qualified to receive benefits and participate in the federal program; and (3) class members have been excluded from the benefits of the program solely because of their disabilities. (Sullivan v. Vallejo City Unified School Dist., 731 F.Supp 947, 957 (E.D. Cal. 1990).)

An individual is disabled and subject to the protections of the Rehabilitation Act only if the individual (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. 34 C.F.R. § 104.3 (j).

Petitioners have never alleged and never argued in their numerous, lengthy briefs that they meet the definition of disabled under Section 504. Thus, any question of a right of action under this statute is not at issue here.

*Question* 4. *Does wanton elementary instruction and willful non-assessment of elementary school students under IDEA, constitute violations of the guarantees of equal protection, procedural and substantive due process under the 14th Amendment to the United States Constitution since it is uncontested that the state of California has chosen to provide a system of education to the residents of California and the 14th Amendment requires that a state which has undertaken to*

*provide the opportunity of an education made that opportunity available to all on equal terms--especially when the California Constitution states education is a fundamental right?*

With this issue, Petitioners appear to be questioning whether alleged "wanton elementary instruction" at a particular California elementary school and violations of the IDEA procedures are constitutional violations.

Since this Court has held in San Antonio Independent School Dist. v. Rodriguez, supra, 411 U.S. at pp. 35-36 that the right to an education is not guaranteed under the United States Constitution, the quality of that education is certainly not constitutionally protected under federal law.

Moreover, this court could not reach the question of whether alleged violations of the IDEA are unconstitutional because Petitioners never met the pleading requirements of an action under the IDEA. Primarily they did not exhaust their administrative remedies, which means that they did not first litigate this matter at a due process hearing. 20 U.S.C. § 1415, subd. (e)(2).

Question number 4 raises no significant legal questions for the Court even if it were ripe for adjudication.

*Question* 5. *Despite state case law and various government codes, it is illegal and unconstitutional for school districts and their employees to:*

*(a) engage in bad faith school-wide policies which deprive the elementary school students of*

*the educational opportunity to which they are constitutionally and statutorily entitled under IDEA and section 504 of the Rehabilitation Act; and*

*(b) willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed to the extent that teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities; and*

*(c) refuse to assess students when their parents request assessment; and*

*(d) if the student is diagnosed with a disability, as Roberto was, Respondents cannot refuse or unjustifiably delay to develop a special education program for the student; and*

*(e) fail to inform or, in fact, misinform parents of their children's progress by (i) refusing to provide the students' low CTBS scores which are addressed specifically to the parents; and (ii) simultaneously giving these students A's and B's in these subjects when CBTS scores indicate they're in the bottom percentages nation-wide; and*

*(f) conduct an age promotion policy which pushes the students--like herds of cattle--to the next grade despite their illiteracy.*

This question, as with all the others, raises issues of the effectiveness of public education and abstract rights under the IDEA and Section 504. The effectiveness of public education is a social, philosophical, economic, and political issue; it is not a legal issue for the Supreme Court.

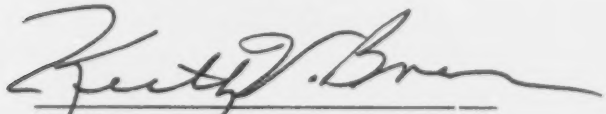
As discussed repeatedly throughout this brief, Petitioners failed to meet the threshold requirements of the IDEA and Section 504. This Court cannot therefore address issues raised as to perceived violations of those statutes by the District.

## CONCLUSION

This case raises state law issues regarding public education and presents no federal question. Certiorari is inappropriate and must be denied.

Dated: March 22, 1996 Respectfully submitted,

BREON, O'DONNELL
MILLER, BROWN & DANNIS
KEITH V. BREON
NANCY B. BOURNE



Keith V. Breon
Counsel of Record for Respondents

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**IN THE COURT OF APPEAL OF THE**

**STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION THREE**

| | | |
|---|---|---|
| CLASS OF LOURDES GUTIERREZ, etc. et al. | ) | G013841 |
| | ) | (Super. Ct. No. 697402) |
| Plaintiffs and Appellants, | ) | |
| v. | ) | OPINION |
| SANTA ANA UNIFIED SCHOOL DISTRICT, et al. | ) | |
| Defendants and Respondents. | ) | |

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Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge. Affirmed.

Emir Phillips and Eleanor Oths for Plaintiffs and Appellants.

Breon, O'Donnell, Miller, Brown & Dannis, Keith V. Breon, Nancy B. Bourne, Bridget A. Flanagan and Laurie S. Juengert for Defendants and Respondents.

Lourdes Gutierrez filed this action against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The first amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorneys fees. The trial court sustained the demurrers of the school district and Dr. Castruita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action lawsuit and failed to state any cognizable cause of action. We affirm.

This action arises out of the frustration and anger felt by Lourdes Gutierrez because her son, Roberto, emerged from five years of instruction at Glenn Martin public elementary school as a functional illiterate in the English language. The complaint alleges the District failed to instruct minimal skills and failed to test, evaluate or remedy Roberto's learning disabilities, resulting in irreparable injury. Claiming Roberto's case is indicative of all students at Glenn Martin and that she is able to protect their interests, Gutierrez asks the court to issue an injunction closing Glenn Martin and giving the operating funds to the parents in the form of vouchers for private education. She also seeks an order requiring the District to notify all parents of their rights and their children's standardized test scores. On behalf of Roberto individually, she asks for compensatory and punitive damages and attorney fees.

The first amended complaint sets out Roberto's

educational experience in some detail. While Roberto was enrolled in kindergarten through second grade, Gutierrez was informed of Roberto's problem with spelling, but she was otherwise reassured about his progress. During Roberto's third grade year, however, the family moved to the City of Corona for three months, where he attended John Adams Elementary School. There, Roberto was tested because of an "illiteracy problem", and it was discovered that he had a first grade reading level. An individualized educational program (IEP) was intiated for Roberto.

When the family returned to Santa Ana (and Glenn Martin), Gutierrez, unaware that the IEP process had been started at John Adams and the documentation had been transferred to Glenn Martin, asked the principal to initiate its own IEP. She was repeatedly promised an IEP but nothing was done for almost one year. She was told Roberto needed help in reading, writing and spelling and that special classes would be developed for Roberto, but nothing was done. Finally, at the insistence of Roberto's third grade teacher, Roberto was evaluated by a district psychologist, Dr. Ramon.

When Roberto was enrolled in the fourth grade, Dr. Ramon met with Gutierrez; he informed her Roberto was "a strong and smart boy but had never been taught correctly," and his problems could have been overcome. Roberto's fourth grade teacher finally explained to Gutierrez that she needed to sign a form to legally obligate Glenn Martin to conduct an IEP within 60 days. At the ensuing IEP hearing, Dr. Ramon changed his conclusions and stated Roberto's problems arose from auditory and visual problems. Confused by the discrepancies in Dr. Ramon's opinions, Gutierrez

requested another IEP to be conducted by an independent psychologist. The independent psychologist, Adela de la Torres, concluded Roberto's deficiencies were caused by the improper instruction of English.

When the first amended complaint was filed, Roberto was repeating the fourth grade and attending special classes three hours a day. He was "humiliated by his illiteracy."

Gutierrez alleges the District has a "no retention" policy that requires students to be promoted to the next grade level based on their age rather than their abilities. This policy discourages teachers from identifying and testing students with learning disabilities, preparing remedial programs for them, and accurately assessing their skills and communicating the assessments to parents. Parents receive no notification or explanation of poor scores on the California Test of Basic Skills (CTBS) while their students receive passing grades on their report cards. Thus, parents are erroneously assured their children can read and write English. Furthermore, parents are not informed of forms requiring their signatures to retain a child or to initiate an IEP.

Based on these facts, Gutierrez alleges 10 causes of action. The first is for negligence in: failing to discover Roberto's reading and writing disabilities; allowing him to pass to the next grade level; assigning him to classes and instructors not suited to his needs; failing to inform parents of their children's educational progress; and failing to promulgate a minimum course of instruction and minimum standard of proficiency to pass each grade. Roberto's damages include learning deficiencies which have rendered

him handicapped, psychological harm, his diminished earning capacity, and the costs of a tutor.

The second cause of aciton is for intentional misrepresentation to the parents that the students were performing at or near grade level when in fact they were seriously below grade level and in need of remedial instruction. The parents relied on these misrepresentations and failed to obtain remedial instruction for their children. The District also intentionally failed to disclose the students' poor CTBS scores to the parents. The damages alleged are personal to Roberto and the same as the first cause of action. Gutierrez also seeks punitive damages.

The third cause of action repleads the second in the form of negligent misrepresentation. The fourth cause of action is for intentional infliction of emotional distress. The fifth cause of action is for breach of implied contract between the taxpayers and the state, of which Roberto is an alleged third party beneficiary.

In the sixth cause of action, Gutierrez alleges the District has violated the United States Constitution by denying Roberto and members of the class equal educational opportunities, and by failing to provide them with "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and for full participation in the political process." Gutierrez also alleges a deprivation of the class members' right to liberty by "forcing them to attend Glen [sic] Martin Elementary School" without providing them the opportunity to acquire minimal skills.

The seventh cause of action alleges violations of the California Constitution by the deprivation of the class members' "fundamental rights to education," the denial of equal educational opportunities and their rights to liberty.

The eighth cause of action alleges a violation of the District's statutory duty under the Education of All Handicapped Children Act (IDEA)[1/] by not providing a free and appropriate education to all handicapped children. The ninth cause of action alleges violations of the Rehabilitation Act by failing to adhere to proscribed regulations and federal and state policies regarding educational rights of handicapped children. And the tenth cause of action alleges a violation of 42 United States Code section 1983 for discrimination against handicapped children.

## I. Claims Based On Educational Malpractice

The theory underlying Gutierrez' first cause of action for negligence, educational malpractice, has been rejected by the appellate courts. In ***Peter W.* v. *San Francisco Unified Sch. Dist.*** (1976) 60 Cal. App.3d 814, the plaintiff, who had recently graduated from high school following twelve years of public instruction, alleged negligence against the school district in terms remarkably similar to those in the complaint before us. He claimed school officials failed to provide him with adequate instruction by failing to discover his reading disabilities, passing him to higher levels without the requisite competency, and assigning him to classes and teachers unsuited to his needs. The

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[1/]EAHCA was amended in 1990 and is now known as the Individuals with Disabilities Education Act (IDEA).

court analyzed the pleading in terms of whether there was a legal duty of care, the breach of which would sustain a cause of action for negligence.

After establishing that the existence of a duty of care presents a pure question of law, the court stated, "[J]udicial recognition of [a] duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by considerations of public policy." (*Id.* at p. 822.) The traditional policy considerations when contemplating a new area of tort liability led the court to conclude no duty of care could exist: "We find in this situation no conceivable 'workability of a rule of care' against which defendant's alleged conduct may be measured [citation], no reasonable 'degree of certainty that . . . plaintiff suffered injury' within the meaning of the law of negligence [citation], and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish a causal link between them within the same meaning. [Citation.]" (*Id.* at p. 825.)

The court found that practical considerations also weighed heavily against an actionable duty of care in educators. "Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of

school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care,' in the discharge of their academic functions, would expose them to the tort claims -- real or imagined -- of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [Citations.] The ultimate consequences, in terms of public time and money, would burden them -- and society -- beyond calculation." (***Ibid.*** see also, ***Chevlin* v. *Los Angeles Community College Dist.*** (1989) 212 Cal.App.3d 382.)

Gutierrez urges us to disagree with ***Peter W.***, arguing the issue is really a question of proximate cause for the jury, i.e., was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimed here is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (***Peter W.* v. *San Francisco Unified Sch. Dist., supra,*** 60 Cal.App.3d at p. 824.) We agree with the ***Peter W.*** court and decline to create an actionable duty of care in those who administer the academic phases of the public educational process.

The fifth cause of action, for breach of implied contract, has also been rejected by previous decisions as a thinly disguised claim for educational malpractice. In ***Chevlin***, the plaintiff sued

the community college district after she was terminated from its nuclear medicine technology program and from her employment as a program intern, alleging multiple causes of action including negligence and breach of contract. The defendant had entered into affiliation agreements with the hospitals and, like Gutierrez, the plaintiff asserted she had standing as a third-party beneficiary. The court distinguished ***Zumbrun* v. *University of Southern California*** (1972) 25 Cal.App.3d 1, where a studednt was permitted to seek recovery for tuition and other fees under a breach of contract theory because one of her instructors refused to teach the final month of a class in protest of the United States' invasion of Cambodia. "Here, however, Chevlin is suing a public institution and seeking compensatory damages for her inability to find employment as a nuclear medicine technologist. We think it obvious that to permit Chevlin to recover under a breach of contract theory based on educational nonfeasance would be tantamount to permitting her to sue for negligence which is precluded under the ***Peter W.*** decision. Whether framed as a negligence or breach of contract theory the harm which Chevlin seeks to redress is the same." (***Chevlin* v. *Los Angeles Community College Dist.***, *supra*, 212 Cal.App.3d at p. 390.) The same rationale applies here.

## II. Claims Based on Constitutional Violation

In the sixth and seventh causes of action, Gutierrez alleges a jumble of state and federal constitutional violations. But they all boil down to a claim for inadequate education.

**A. Equal Protection**

Gutierrez apparently claims a violation of the equal protection clauses of the state and federal constitutions by alleging that Roberto and members of the class have been denied "equal educational opportunity." An essential allegation of an equal protection violation under both state and federal law is that persons similarly situated are singled out for unequal treatment on an impermissible basis. (***City of Cleburne* v. *Cleburne Living Center, Inc.*** (1985) 473 U.S. 432; ***Educational & Recreational Services, Inc.* v. *Pasadena Unified Sch.Dist.*** (1977) 65 Cal.App.3d 775, 785; ***Smith v. Philadelphia School Dist.*** (E.D.Pa. 1988) 679 F.Supp. 479.) But Gutierrez has failed to allege that Roberto and the class are treated differently from students similarly situated within the District. In fact, she alleges the existence of a district-wide policy of promoting students to higher grades based on age rather than ability. In ***Gallagher* v. *Pontiac School Dist.*** (6th Cir. 1986) 807 F.2d 75, the court rejected a similar challenge from a deaf child who claimed he was denied an education commensurate with his needs. "[Gallagher] never explains how he was treated any differently from any similarly situated students. The essence of his claim does not constitute a valid equal protection challenge. When a handicapped child does not allege that he has been singled out or treated differently from the nonhandicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." (***Id.***, at p. 79, emphasis omitted.)

Gutierrez also attempts to bolster her equal protection claim by contending she has alleged the denial of a fundamental right, thus subjecting the District policies to strict scrutiny.

Although the right to an education is not guaranteed under the federal constitution (***San Antonio Independent School District* v. *Rodriguez*** (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution (***Serrano* v. *Priest*** (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the right to equality of funding or access to education, not the level of quality. (***Ibid; Butt* v. *State of California*** (1992) 4 Cal.4th 668.) In ***Butt***, the Supreme Court made that clear: "Of course, the Constitution does not prohibit all disparities in educational quality or service. Despite extensive State regulation and standardization . . ., the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. '[A] requirement that [the State] provide [strictly] "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons . . .' [Citation.] Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (***Butt* v. *State of California, supra,*** 4 Cal.4th at p. 686.)

**B. Due Process**

Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing ***DeShaney* v. *Winnebago Cty.Soc.Servs.Dept.*** (1989) 489 U.S. 189, she claims that the students were deprived of liberty without due process. But ***DeShaney*** discusses deprivations of liberty

resulting in the denial of basic human needs: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- e.g., food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (***Id.*** at p. 200.) Compulsory school attendance laws do not create a special relationship between the student and the school. (***Graham* v. *Independent Sch. Dist.*** (10th Cir. 1994) 22 F.3d 991, 994.)

Gutierrez also claims the District has taken away the students' "legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause . . ." (***Goss* v. *Lopez*** (1975) 419 U.S. 565, 575.) Unlike the situation here, however, the constitutional affront in ***Goss*** was a student's total exclusion from the educational process during a 10-day suspension imposed without a hearing. The court found the right to an education extended by the state could not be withdrawn "on grounds of misconduct absent[] fundamentally fair procedures to determine whether the misconduct has occurred." (***Ibid.***)

**III. Claims Based On Violations of Statutory Duties**

**A. Individuals With Disabilities Education Act**

Gutierrez's eighth cause of action alleges a violation of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.). IDEA is designed to "assure that all children with disabilities have available to them . . . a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs . . ." (20 U.S.C. § 1400, subd.(c).) We seriously question whether all children at Glenn Martin Elementary School (the proposed class) or even Roberto individually fit within the definition of children with disabilties under the act.[2/] But in any event, Gutierrez has failed to allege the required element that Roberto (or the class members) has exhausted his administrative remedies. The statute expressly provides that the right to bring a civil action in state or federal court obtains only to a plaintiff who is aggrieved as the result of the findings and decision of a due process hearing conducted by the state educational agency. (20 U.S.C. § 1415, subds. (b)(2), (c), (e)(2). See also, ***Buffallo v. Bd. Of Educ. Of Sachem Cent. Sch.D.*** (E.D.N.Y 1990) 729 F.Supp. 240.)

Gutierrez does not claim Roberto or any other class member has exhausted his administrative remedies; but she argues it would be futile to do so because "[t]he school has limited hearing officers and it would take years to adjudicate hundreds of Plaintiffs' claims to an appeal level." This, of course, is mere speculation which does not suffice to excuse the

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[2/] The definition of "children with disabilities" includes children with "specific learning disabilities . . .[¶] who, by reason thereof, need special education and related services." (§ 1401, subd. (a)(1)(A).) "Children with specific learning disabilities" is defined as "those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, speak, think, read, write, spell, or do mathematical calculations," but the definition specifically excludes "children who have learning problems which are primarily the result of . . . environmental, cultural, or economic disadvantage." (§ 1401, subd. (a)(15).)

exhaustion of administrative remedies for the class as a whole. (***Jackson* v. *Fort Stanton Hosp. & Training School*** (D.N.M. 1990) 757 F.Supp. 1243, 1304, revd. on other grounds (10th Cir. 1992) 964 F.2d 980.) Furthermore, a due process hearing for Roberto was scheduled to take place during the pendency of this appeal,[3/] demonstrating that his claim under IDEA was premature, at best.

**B. Rehabilitation Act of 1973**

Similarly, Gutierrez's ninth cause of action under the Rehabilitation Act of 1973 (29 U.S.C. § 794)[4/] fails for lack of exhaustion of administrative remedies. When seeking relief by way of a civil action under the Vocational Rehabilitation Act that is also available under the IDEA, a plaintiff must exhaust administrative remedies to the same extent as is required under IDEA. (20 U.S.C. § 1415, subd. (f); ***Calhoun* v. *Illinois State Bd. Of Educ., Etc.*** (N.D.Ill. 1982) 550 F.Supp. 796.)

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[3/] This court has taken judicial notice of the notice of hearing issued by the Special Education Hearing Office scheduling a due process hearing in Roberto Gutierrez v. Santa Ana Unified School District (SN 407-93) for October 7 and 8, 1993. (Evid. Code, § 452, subd. (c).)

[4/] The purpose of the Rehabilitation Act is to assure that federally assisted programs and activities are operated without discrimination on the basis of disability. (29 U.S.C. § 794.) A claimant under the Act must be disabled such that he has a physical or mental impairment which substantially limits a major life activity. (34 C.F.R. § 104.3 (j).) Gutierrez's unsupported assertion that severe functional illiteracy meets this definition is not plausible.

### C. 42 United States Code section 1983

Gutierrez also attempts to state a claim under 42 United States Code section 1983 of the Civil Rights Act. To be entitled to relief under this section, a plaintiff must show that a person acting under color of state law acted to deprive him of a constitutional right. (***Mason* v. *Waukesha County*** (E.D. Wis. 1994) 855 F.Supp. 282, 285.) As discussed above, Gutierrez has not done this. Absent the effective pleading of an independent constitutional violation, she cannot seek redress for the denial of an appropriate education under the Civil Rights Act. A plaintiff cannot "circumvent the procedural requirements of the two comprehensive statutes dealing with handicapped individuals [IDEA and the Rehabilitation Act] by going directly . . . under § 1983 to obtain an adjudication that [she] had been denied the benefits of those statutes." (***Austin* v. *Brown Local School Dist.*** (6th Cir. 1984) 746 F.2d 1161, 1166.)

## IV. Miscellaneous claims

Gutierrez's second and third causes of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. (***Chevlin* v. *Los Angeles Community College Dist.*, *supra***, 212 Cal.App.3d at p. 390.)

Gutierrez does not argue her fourth cause of action, for intentional infliction of emotional distress, should have survived the demurrer; thus she has waived any error on appeal. It is

clear, however, that she has failed to allege any facts to support the requisite outrageous conduct or the intent to cause severe emotional distress. (***Cervantes* v. *J.C. Penny Co.*** (1979) 24 Cal.3d 579, 593.)

Gutierrez makes no argument or showing that she can amend to cure these pleading deficiencies; because none of the causes of action survive as to Roberto individually, we need not discuss the propriety of the class action. Accordingly, the judgment is affirmed.

/s/ WALLIN
WALLIN, ACTING P.J.

WE CONCUR:

/s/ SONENSHINE
SONESHINE, J.

/s/ CROSBY
CROSBY, J.

95-1451 (3)

Supreme Court, U.S.
FILED
JUL 13 1995
CLERK

No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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October Term, 1995

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Class of Lourdes Gutierrez, et. al.,

Petitioner,

versus

Santa Ana Unified School District, et. al.,

Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION THREE**

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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52 pp

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A. Statement of Facts

The widespread illiteracy problem at Glen Martin is astounding. As alleged in the Complaint, 75% to 80% of the graduating Students at Glen Martin Elementary School read at levels between kindergarten and third grade. (CT. 65). Why are such a large number of children unable to read even minimally by the end of fifth grade graduation? The School District provides unhelpful excuses, the trial court refused to get involved, and the Students graduate as illiterate victims. The class representative, Petitioner Roberto Gutierrez, is such a victim. So are his parents. The following is an account of their process at Glen Martin Elementary School: the cruel process of no real educational opportunity.

In 1987, Roberto enrolled in Glen Martin Elementary School for kindergarten. Mrs. Gutierrez, a native of Mexico, wanted to ensure that Roberto not use Spanish as a crutch, and enrolled her son in the English immersion program. (CT. 61). This program requires that all of Roberto's classes be taught in English. Roberto's kindergarten teacher informed Mrs. Gutierrez that her son needed to practice his ABCs. Mrs. Gutierrez tried to helped her son learn the alphabet and he improved somewhat. (CT. 61).

In the first grade, Roberto's teacher informed Mrs. Gutierrez that Roberto could not spell because he had difficulty stringing letters together. (CT. 61). Mrs. Gutierrez tried to help her son learn to spell words but was prevented by her limited English abilities. By the second grade, Mrs. Gutierrez realized that Roberto was having difficulty completing his

homework and she was unable to correct his errors. (CT. 61). Mrs. Gutierrez sought help from Roberto's teacher but was told that Roberto did not have a problem and that he just needed to practice the alphabet more. (CT. 62).

In the third grade, Roberto's family moved to Corona for three months where he attended John Adams Elementary School. (CT. 62). During this period, John Adams detected immediately that Roberto had an illiteracy problem, tested him and concluded that despite being a third-grader, he had a first grade reading ability. (CT. 62). The educators at John Adams began an Individualized Education Program ("IEP") to deal with Roberto's learning disability. (CT. 62).

Shortly thereafter, Roberto's family moved back to Santa Ana and re-enrolled Roberto in Glen Martin. (CT. 62). At that time,

Mrs. Gutierrez asked Glen Martin to devise an IEP for Roberto because Roberto was assessed as having reading difficulty. (CT. 62). The principal at Glen Martin informed Mrs. Gutierrez that Roberto had to reapply as a "new student." (CT. 63). Roberto's application to be re-admitted to Glen Martin was "approved" three months later, one month of which Glen Martin was in session. (CT. 63).

When Glen Martin finally readmitted Roberto, his teacher informed him that the teacher would soon meet with the school psychologist and the principal to develop an IEP. (CT. 63). Mrs. Gutierrez was informed that someone at Glenn Martin would contact her within three weeks to discuss Roberto's IEP. Three weeks passed and nobody called. (CT. 63). During this time, Mrs. Gutierrez requested repeatedly that an IEP be developed for Roberto. The principal refused to develop

an IEP for Roberto contending that the school psychologist was busy. (CT. 64). Roberto's third grade teacher insisted that another psychologist be called. (CT. 63). Although another psychologist, Dr. Ramon, was contacted, the School District waited over six months to assess Roberto because the School District failed to inform Mrs. Gutierrez that she had to sign a form to obligate the School District to initiate an IEP for Roberto. (CT. 63, 64, 88). The signing of this pink parent-consent form activates mandatory assessment under the Individual with Disabilities Education Act. ("IDEA").

Glenn Martin Elementary School is not informing parents of the need to sign this pink form, and any teachers who request that a student be assessed under IDEA is harassed until such requests cease. Roberto's fourth

grade teacher, Darlene Carney, was such a teacher

In December 1991, Dr. Ramon made an appointment to meet with Mrs. Gutierrez. (CT. 64). The meeting took place and Dr. Ramon advised Mrs. Gutierrez that her son's problems stemmed from improper instruction and that the problems could be overcome. (CT. 64). At the IEP hearing, however, Dr. Ramon changed his story. He stated that Roberto's learning disabilities stemmed not from improper instruction but rather from auditory and visual problems. (CT. 64).

Confused by Dr. Ramon's contradictory opinions, Mrs. Gutierrez requested that Roberto be assessed by an independent psychologist. (CT. 64). Adela de la Torres was chosen by Petitioners to conduct the battery of testing. After examining Roberto, Ms. de la Torres concluded that Roberto's learning

disabilities were caused by the improper instruction of English. (CT. 64). Since the filing of this Appeal, Roberto recently graduated from Glen Martin with a first grade level in reading. At his graduation ceremony, Roberto received a Certificate of Perfect Attendance.

Students at Glen Martin suffer a similar fate as Roberto. For example, student Elizabeth Esparza received an "A" in spelling and an "O" for outstanding effort. (CT. 66). Despite Elizabeth's "A", she tested at a first grade ability in spelling and is in the bottom one percentile in the United States for this subject. (CT. 66).

What is going wrong with the education process? The causes are many and are based on Respondents' bad faith school-wide policies - policies which deprive the Students of the educational opportunity to

which they are constitutionally and statutorily entitled. Specifically, Respondents willfully and in bad faith refuse teachers' recommendations that a student's learning disabilities be assessed (CT, 65 and 223). In fact, teachers are forced to send notes home with the children to have parents request that their children be assessed for learning disabilities. (CT. 223).

Respondents equally refuse to assess students when their parents request assessment. (CT. 62-63). Even if the student is diagnosed with a disability, as Roberto was, Respondents refuse or unjustifiably delay to develop a special education program for the student. Moreover, Respondents fail to inform or, in fact, misinform parents of their children's progress by (1) refusing to provide the students' low CTBS scores which are addressed specifically to the parents (CT. 107);

and (2) simultaneously giving these students As and Bs in these subjects when CTBS scores indicate their in the bottom percentages nation-wide. (CT, 87, 107-112). Furthermore, Respondents' age promotion policy pushes the students -- like herds of cattle -- to the next grade despite their illiteracy. (CT 65-66, 105-106).

Most disconcerting, however, is the fact that Respondents are tampering with students' files in order to remove any incriminating evidence of their failure to provide an appropriate education. (CT. 223). All these policies are implemented in the hallowed name of education.

Over and over in this story, one is struck by examples of outrageous conduct, gross misrepresentations and/or careless instances of communication failure between child and teachers, between parents and the

school administration, between the Santa Ana School District and outside professionals, between bureaucrats and outside, independent testers. There was no hint of coordination of goals or, in fact, of any joint planning between grades. Each level of Roberto's schooling was run as a separate operation, unburdened by knowledge of what had come before or by preparation for what was yet to come. This breakdown in communication was most apparent, and most infuriating, during Roberto's transition from third and fourth grade, when Glen Martin removed from Roberto's file his IEP prepared by Corona Elementary School.

If this U.S. Supreme Court can learn to listen and see differently, it will hear more than the standard jargon that Respondents are not responsible and see Elizabeth Esparza staring at her book, the "A" in reading at

home on the refrigerator and her confused fear as she continues today to dumbly stare at the page and doodle in the margins while back home Mom and Dad unwittingly gloat about their bright daughter. Everyone is as misinformed as Elizabeth Esparza's parents--except Respondents. They had knowledge of Elizabeth's CTBS scores but failed to inform Elizabeth's parents that despite her "A" in reading she is, in fact, in the bottom one percentile in this subject and functionally illiterate!

[Please note that the Appellate Court's Statement of Facts largely and nearly verbatim follows Petitioners.]

**IN THE COURT OF APPEAL OF THE**

**STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION THREE**

| | | |
|---|---|---|
| CLASS OF LOURDES GUTIERREZ, etc. et al., | ) | G013841 |
| | ) | |
| | ) | (Super. Ct. |
| Plaintiffs and Appellants, | ) | No. 697402) |
| | ) | |
| v. | ) | |
| | ) | |
| SANTA ANA UNIFIED | ) | |
| SCHOOL | ) | OPINION |
| DISTRICT et al., | ) | |
| | ) | |
| | ) | |
| Defendants and | ) | |
| Respondents | ) | |
| ---------- | ) | |

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge, Affirmed.

Emir Phillips and Eleanor Oths for Plaintiffs and Appellants.

Breon, O'Donnell, Miller, Brown & Dannis, Keith V. Breon, Bridget A. Flanangan and Laurie S. Juengert for Defendants and Respondents.

Lourdes Gutierrez filed this action against the Santa Ana Unified School District and its superintendent, Rudy Castruita, on behalf of a class consisting of her son, Roberto Gutierrez, and all students and parents of students of Glenn Martin Elementary School. The First amended complaint alleges negligent instruction, misrepresentation and a host of constitutional and statutory violations; it seeks compensatory and punitive damages, declaratory and injunctive relief, and attorney fees. The trial court sustained the demurrers of the school district and Dr. Castuita (the District) without leave to amend, on the grounds that the complaint failed to state facts sufficient to constitute a class action

lawsuit and failed to state any cognizable cause of action. We affirm.

* * * * *

This action arises out of the frustration and anger felt by Lourdes Gutierrez because her son, Roberto, emerged from five years of instruction at Glenn Martin public elementary school as a fuctional illiterate in the English language. The complaint alleges the District failed to instruct minimal skills and failed to test, evaluate or remedy Roberto's learining disabilities, resulting in irreparable injury. Claiming Roberto's case is indicative of all students at Glenn Martin and that she is able to protect their interests, Gutierrez asks the court to issue an injunction closing Glenn Martin

and giving the operating funds to the parents in the form of vouchers for private education. She also seeks an order requiring the District to notify all parents of their rights and their children's standardized test scores. On behalf of Roberto individually, she ask for compensatory and punitive damages and attorney fees.

The first amended complaint sets out Roberto's educational experience in some detail. While Roberto was enrolled in kindergarten through second grade, Gutierrez was informed of Roberto's problem with spelling, but she was otherwise reassured about his progress. During Roberto's third grade year, however, the family moved to the City of Corona for three months, where he

attended John Adams Elementary School. There, Roberto was tested because of an "illiteracy problem," and it was discovered that he had a first grade reading level. An individualized educational program (IEP) was initiated for Roberto.

When the family returned to Santa Ana (and Glenn Martin), Gutierrez, unaware the the IEP process had been started at John Adams and the documentation had been transferred to Glenn Martin, asked the principal to initiate its own IEP. She was repeatedly promised an IEP but nothing was done for almost one year. She was told Roberto needed help in reading, writing, and spelling and that special classes would be developed for Roberto, but nothing was done. Finally, at the insistence of

Roberto's third grade teacher, Roberto was evaluated by a district psychologist, Dr. Ramon.

When Roberto was enrolled in the fourth grade, Dr. Ramon met with Gutierrez; he informed her Roberto was "a strong and smart boy but had never been taught correctly," and his problems could have been overcome. Roberto's fourth grade teacher finally explained to Gutierrez that she needed to sign a for to legally obligate Glenn Martin to conduct an IEP within 60 days. At the ensuing IEP hearing, Dr. Ramon changed his conclusions and stated Roberto's problems arose from auditory and visual problems. Confused by the discrepancies in Dr. Ramon's opinions, Gutierrez requested another IEP to be conducted by an

independent psychologist. The independent psychologist, Adela de la Torres, concluded Roberto's deficiencies were caused by the improper instruction of English.

When the first amended complaint was filed, Roberto was repeating the fourth grade and attending special classes three hours a day. He was "humiliated by his illiteracy."

Gutierrez alleges the District has a "no retention" policy that requires students to be promoted to the next grade based on their age rather than their abilities. This policy discourages teachers from identifying and testing students with learing disabilities, preparing remedial programs for them, and accurately assessing their skills and communicating

the assessments to parents. Parents receive no notification or explanation of poor scores on the California Test of Basic Skills (CTBS) while their students receive passing grades on their report cards. Thus, parents are erroneously assured their children can read and write English. Furthermore, parents are not informed of forms requiring their signatures to retain a child or to initiate an IEP.

Based on these facts, Gutierrez alleges 10 causes of action. The first is for negligence in : failing to discover Roberto's reading and writing disabilities; allowing him to pass to the next grade level; assigning him to classes and instructors not suited to his needs; failing to inform parents of their children's educational progress; and failing to promulgate a

minimum course of instruction and a minimum standard of proficiency to pass each grade. Roberto's damages include learning deficiencies which have rendered him handicapped, psychological harm, his diminished earning capacity, and the costs of a tutor.

The second cause of action is for intentional misrepresentation to the parents that the students were performing at or near grade level when in fact they were seriously below grade level and in need of remedial instruction. The parents relied on these misrepresentations and failed to obtain remedial instruction for their children. The District also intentionally failed to disclose the students' poor CTBS scores to the parents. The damages alleged are personal to

Roberto and the same as the first cause of action. Guiterrez seeks punitive damages.

The third cause of action repleads the second in form of negligent misrepresentation. The fourth cause of action is for intentional infliction of emotional distress. The fifth cause of action is for breach of an implied contract between the taxpayers and the state, of which Roberto is an alleged third party beneficiary.

In the sixth cause of action, Gutierrez alleges the District has violated the United States Constitution by denying Roberto and members of the class equal educational opportunities, and by failing to provide them with "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech

and for full participation in the political process." Gutierrez also alleges a deprivation of the class members' right to liberty by "forcing them to attend Glen [sic] Martin Elementary School" without providing them the opportunity to acquire minimal skills.

The seventh cause of action alleges violations of the California Constitution by the deprivation of the class members' "fundamental right to education," the denial of equal educational opportunities and their right to liberty.

The eighth cause of action alleges a violation of the District's statutory duty under the Education of All Handicapped Children Act (IDEA)[1] by not providing a

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[1] EAHCA was amended in 1990 and is now known as the Individuals with Disabilities Education Act (IDEA).

free and appropriate education to all handicapped children. The ninth cause of action alleges violations of the Rehabilitation Act by failing to adhere to proscribed regulations and federal and state policies regarding educational rights of handicapped children. And the tenth cause of action alleges a violation of 42 United States Code section 1983 for discrimination against handicapped children.

## *I. Claims Based on Educational Malpractice*

The theory underlying Gutierrrez's first cause of action for negligence, educational malpractice, has been rejected by the appellat courts. In *Peter W. v, San Francisco Unified Sch. Dist.* (1976) 60

Cal.App.3d 814, the plaintiff, who had recently graduated from high school following twelve years of public instruction, alleged negligence against the school district in terms remarkably similar to those in the complaint before us. He claimed school officials failed to provide him with adequate instruction by failing to discover his reading disabilities, passing him to higher levels without the requisite competency, and assigning him to classes and teachers unsuited to his needs. The court analyzed the pleading in terms of whether there was a legal duty of care, the breach of which would sustain a cause of action for negligence.

After establishing that the existence of a duty of care presents a pure question of law, the court stated, "Judicial

recognition of a duty in the defendant, with the consequence of his liability in negligence for its breach, is initially to be dictated or precluded by consideration of public policy." (**Id**. at p. 822) The traditional policy considerations when contemplated a new area of tort liability led the court to conclude no duty of care could exist. "We find in this situation no conceivable 'workability of a rule of care' against which defendants' alleged conduct may be measured [citation], no reasonable 'degree of certainty that ... plaintiff suffered injury' within the meaning of the law of negligence [citation], and no such perceptible 'connection between the defendant's conduct and the injury suffered,' as alleged, which would establish

a causal link between them within the same meaning. [Citation.] (**Id.** at p. 825)

The court found that practical considerations also weighed heavily against an actionable duty of care in educators. "Few of our insitutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale

rejections of school bond proposals, and in survey upon survey. To hold them to an actionable 'duty of care', in the discharge of their academic functions, would expose them to the tort claims--real or imagined--of disaffected students and parents in countless numbers. They already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. [Citations.] The ultimate consequences, in terms of public time and money, would burden them--and society-- beyond calculation." (**Ibid.**; see also, **Chevlin v. Los Angeles Community College Dist.** (1989) 212 Cal.App.3d 382.)

Gutierrez urges us to disagree with ***Peter W.***, arguing the issue is really a question of proximate cause for the jury,

i.e. was the District's negligence a substantial factor in Roberto's illiteracy? But this approach presents the same pitfalls inherent in the duty analysis: "The 'injury' claimedhere is plaintiff's inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified." (***Peter W. v. San Francisco Unified Sch. Dist.,*** ***supra***, 60 Cal.App.3d at 824.) We agree with the ***Peter W.*** court and decline to

create an actionable duty of care in those who administer the academic phases of the public educational process.

The fifth cause of action, for breach of an implied contract, has also been rejected by previous decisions as a thinly disguised claim for educational malpractice. In ***Chevlin***, the plaintiff sued the community college district after she was terminated from its nuclear medicine technology program and from her employment as a program intern, alleging multiple causes of action including negligence and breach of contract. The defendant had entered into affiliation agreements with the hospitals and, like Gutierrez, the plaintiff asserted she had standing as a third-party beneficiary. The court distinguished

***Zumbrun v. University of Southern California*** (1972) 25 Cal.App.3d 1 where a student was permitted to seek recovery for tuition and other fees the final month of a class in protest of the United States' invasion of Cambodia. "Here, however, Chevlin is suing a public institution and seeking compensatory damages for her inability to find employment as a nuclear medicine technologist. We think it obvious that to permit Chevlin to recover under a breach of contract theory based on educational nonfeasance would be tantamount to permitting her to sue for negligence which is precluded under the ***Peter W.*** decision. Whether framed as a negligence or breach of contract theory the harm which Chevlin seeks to redress is the same." (***Chevlin v. Los Angeles***

*Community College Dist., supra,* 212 Cal.App.3d at p. 390.) The same rationale applies here.

## *II. Claims based on Constitutional Violations*

In the sixth and seventh causes of action, Gutierrez alleges a jumble of state and federal constitutional violations. But they all boil down to a claim for inadequate education.

### *A. Equal Protection*

Gutierrez apparently claims a violation of the equal protection clauses of the state and federal constitutions by alleging that Roberto and members of the class have been denied "equal educational opportunity." An essential allegation of an equal protection violation under both

state and federal law is that persons similarly situated are singled out for unequal treatment on an impermissible basis. (***City of Cleburne v. Cleburne Living Center, Inc.***, (1985) 473 U.S. 432; ***Educational and Recreational Services, Inc. v. Pasadena Unified Sch. Dist.*** (1977) 65 Cal.App.3d 775, 785; ***Smith v. Philadelphia School Dist.*** (6th Cir. 1986) 807 F.2d 75, the court rejected a similiar challenge from a deaf child who claimed he was denied an education commensurate with his needs. "[Gallagher] never explains how he was treated any different from any similarly situated students. The essence of his claim does not constitute a valid equal protection challenge. When a handicapped child does not allege that he

has been singled out or treated differently from the non handicapped child, but rather needs additional special services, the fourteenth amendment is rarely implicated." (***Id.*** at p. 79, emphasis omitted.)

Gutierrez also attempts to bolster her equal protection claim by contending she has alleged the denial of a fundamental right, thus subjecting the District policies to strict scrutiny. Although the right to an education is not guaranteed under the federal constitution (***San Antonio Independent School District v. Rodriguez*** (1973) 411 U.S. 1, 35-36), it is a fundamental right under the California Constitution (***Serrano v. Priest*** (1976) 18 Cal.3d 728, 767-768). But that right has been interpreted as the

right to equality of funding or access to education, not the level of quality. (***Ibid., Butt v. State of California*** (1992) 4 Cal.4th 668.) In ***Butt***, the Supreme Court made that clear: "Of course, the Constitution does not prohibit all disparities in educational quality of service. Despite extensive State regulation and standardization..., the experience offered by our vast and diverse public school system undoubtedly differs to a considerable degree among districts, schools, and individual students. These distinctions arise from inevitable variances in local programs, philosophies, and conditions. '[A] requirement that [the State] provide [strictly] "equal" educational opportunities would thus seem to present an entirely unworkable

standard requiring impossible measurements and comparisons....' [Citation.] Moreover, principles of equal protection have never required the State to remedy all ills or eliminate all variances in service." (***Butt v. State of California, supra,*** 4 Cal.4th at p. 686.)

***B. Due Process***

Gutierrez claims her allegations demonstrate that Roberto and members of the class were denied substantive and procedural due process because they were forced to attend a school where they failed to learn. Citing ***DeShaney v. Winnebago Cty. Soc. Servs. Dept.*** (1989) 489 U.S. 189, she claims the students were deprived of liberty without due process. But ***DeShaney*** discusses deprivations of liberty resulting in the

denial of basic human needs: "[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs--eg., food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on the on state action set by the Eighth Amendment and the Due Process Clause." (***Id.*** at p. 200.) Compulsory school attendance laws do not create a special relationship between the student and the school. (***Graham v. Independent Sch. Dist.*** (10th Cir. 1994) 22 F3d. 991, 994.)

Gutierrez also claims the District has taken away the students' "legitimate entitlement to a public education as a

property interest which is protected by the Due Process Clause...." (***Goss v. Lopez*** (1975) 419 U.S. 565, 575.) Unlike the situation here, however, the constitutional affront in ***Goss*** was a student's total exclusion from the educational process during a 10-day suspension imposed without a hearing. The court found the right to an education extended by the state could not be withdrawn "on the grounds of misconduct absent[] fundamentaily fair procedures to determine whether the misconduct has occurred." (***Ibid.***)

## *III. Claims based on violations of statutory duties*

### *A. Individuat with Disabilities Education Act*

Gutierrez's eighth cause of action alleges a violation of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400, subd. (c).) We seriously question whether all children at Glenn Martin Elementary School (the proposed class) or even Roberto individually fit with the definition of children with disabilities under the act.[2] But in any event, Gutierrez has failed to allege the required

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[2] The definition of "children with disabilities" includes children with "specific learining disabilities... ¶ who, by reason thereof, need special education and related services." (§ 1401, subd. (a)(1)(A).) "Children with specific learning disabilities" is defined as "those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations," but the definition specifically excludes "children who have learning problems which are primarily the result of...environmental, cultural, or economic disadvantage." (§ 1401, subd. (a)(15).)

element that Roberto (or the class members) has exhausted his administrative remedies. The statute expressly provides that the right to bring civil action in state or federal court obtains only to a plaintiff who is aggrieved as the result of the findings and decision of a due process hearing conducted by the state educational agency. (20 U.S.C. § 1415, subds. (b)(2), (c), (e)(2). See also, ***Buffolino v. Bd. of Educ. of Sachem Cent. Sch. D.*** (E.D.N.Y. 1990) 729 F.Supp. 240.

Gutierrez does not claim Roberto or any other class member has exhausted his administrative remedies; but she argues it would be futile to do so because "[t]he school has limited hearing officers and it would take years to adjudicate hundreds

of Plaintiffs' claims to an appeal level." This, of course, is mere speculation which does not suffice to excuse the exhaustion of administrative remedies for the class as a whole. (***Jackson v. Fort Stanton Hosp. & Training School*** (D.N.M. 1990) 757 F.Supp. 1243, 1304, revd. on other grounds (10th Cir. 1992) 964 F.2d 980.) Furthermore, a due process hearing for Roberto was scheduled to take place during the pendency of this appeal, [3] demontrating that his claim under IDEA was premature, at best.

***B. Rehabilitation Act of 1973***

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[3] This court has taken judical notice of the notice of hearing issued by the Special Education Hearing Office scheduling a due process hearing in Roberto Gutierrez v. Santa Ana Unified School District (SN 407-93) for October 7 and 8, 1993. (Evid. Code, § 452, subd. (c).)

Similarly, Gutierrez's ninth cause of action under the Rehabilitation Act of 1973 (29 U.S.C. § 794)[4] fails for lack of exhaustion of administrative remedies. When seeking relief by way of a civil action under the Vocational Rehabilitation Act that is also available under the IDEA, a plaintiff must exhaust administrative remedies to the same extent as is required under IDEA. (20 U.S.C. § 1415, subd. (f); ***Calhoun v. Illinois State Bd. of Educ., Etc.*** (N.D.Ill. 1982)550 F.Supp. 796)

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4The purpose of the Rehabilitation Act is to assure that federally assisted programs and activities are operated without discrimination on the basis of a disability. (29 U.S.C. ¶794.) A claimant under the Act must be disabled such that he has a physical or mental impairment which substantially limits a major life activity. (31 C.F.R. § 104.3(j).) Gutierrez's unsupported assertion that severe functional illiteracy meets this definition is not plausible.

### *C. 42 United States Code section 1983*

Gutierrez also attempts to state a claim under42 United States Code section 1983 of the Civil Rights Act. To be entitled to relief under this section, a plaintiff must show that a person acting under color of state law acted to deprive him of constitutional right. (***Mason v. Waukesha County*** (E.D.Wis. 1994) 855 F.Supp. 282, 285.) As discussed above, Gutierrez has not done this. Absent the effective pleading of an independent constitutional violation, she cannot seek redress for the denial of an appropriate education under the Civil Rights Act. A plaintiff cannot "circumvent the procedural requirements of the two comprehensive statutes dealing with

handicapped individuals [IDEA and the Rehabilitation Act] by going directly...under § 1983 to obtain an adjudication that [she] had been denied the benefits of those statutes." (***Austin v. Brown Local School Dist.*** (6th Cir. 1984) 746 F.2d. 1161, 1166.)

### *IV. Miscellaneous Claims*

Gutierrez's second and third cause of action, for intentional and negligent misrepresentation, are barred by Government Code section 818.8, which grants immunity to a public entity for injuries caused by misrepresentations of its employees, whether intentional or negligent. (***Chevlin v. Los Angeles Community College Dist., supra***, 212 Cal.App.3d at p. 390.)

Gutierrez does not argue her fourth cause of action, for intentional infliction of emotional distress, should have survived the demurrer; thus she has waived any error on appeal. It is clear, however, that she has failed to allege any facts to support the requisite outrageous conduct or the intent to cause severe emotional distress. (***Cervantez v. J.C. Penny Co.*** (1979) 24 Cal3d. 579, 593.)

Gutierrez makes no argument or showing that she can amend to cure these pleading deficiencies; because none of the causes of action survive as to Roberto individually, we need not discuss the propriety of the class action. Accordingly, the judgment is affirmed.

/s/WALLIN
WALLIN,
ACTING P.J.

WE CONCUR:

/s/ SONENSHINE
SONESHINE, J.

/s/ CROSBY
CROSBY, J.

Fourth Appellate District Division Three
No. G013841
SD45718

IN THE SUPREME COURT OF CALIFORNIA

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CLASS OF LOURDES GUITIERREZ, Etc. Et Al.,
Appellants

v.

SANTA ANA UNIFIED SCHOOL DISTRICT Et Al., Respondents

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Petition for review DENIED.

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Chief Justice

NEWSPAPER ARTICLE

(Re-typed in double space)

School that was sued scores low in reading. Martin Elementary ranks below district average.

By Dan Broomkin

The Orange County Resgister

Just how well do students in the Santa Ana Unified School District read?

Not too well, according to test results released Monday in the wake of a mother's allegation that the district failed to teach her child properly. In a lawsuit filed against the district, she said her son spent five years at Martin Elementary School without learning to read.

According to results of standardized tests in both English and Spanish, the

average second-semester fourth-grader in the district reads at a 2.6 to 3.1 grade level.

District administrators said they are doing at least as good a job as can be expected considering the disadvantaged backgrounds of many of their students.

"We need to put the scores in context," district spokeswoman Diane Thomas said.

She said most students arrive in the district not speaking English and often are tested in English before they have developed the fluency and sophistication needed to excel.

"We also need to consider the basic academic skills that students bring to school," she said. Often, their families "have limited time and money to provide educational reinforcement."

Sometimes students arrive in kindergarten with "no academic experience,

not knowing how to hold pencils, or not knowing their colors," Thomas said. Other students arrive in later grades with little or no educational background.

"What we want to do is measure acheivment by looking at the level at which the students enter ..... (not legible) .....

A date for the preliminary hearing on parent Lourdes Gutierrez's lawsuit has not been set.

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• **TEST RESULTS:** Scores districtwide and for Martin Elementary students.